M Wealth Corridor Sdn Bhd (formerly known as Fantastic Megaway Sdn Bhd) v Chan Tse Yuen & Co (sued as a firm)

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-810–12 OF 2016
NANTHA BALAN J
26 MARCH 2018

Legal Profession — Solicitors — Solicitor-client relationship — Dishonest conduct — Solicitor represented client before services terminated — Whether solicitor authorised to apply to LHDN for refund of stamp duty — Whether entitled to retain refunded sum — Whether solicitor acted dishonestly — Whether in breach of fiduciary relationship between solicitor and client — Whether solicitor possessed lien over stamp duty documents and stamp duty sum in order to protect their legal fees and disbursements

The defendant, Chan Tse Yuen & Co ('CTY'), was a law firm that represented the plaintiff in real estate conveyancing transaction ('the transaction') and handled a litigation matter for the plaintiff involving another company, Beyond Hallmarks Sdn Bhd ('BH Suit'). The plaintiff was the purchaser under the transaction and its director ('PW1') funded the purchase. The address that was used in the transaction was in Pandan Jaya ('the Pandan Jaya address') and the same appeared in the sale and purchase agreement. The transaction came to an end as it was terminated by the vendor due to the plaintiff's failure to make payment of the balance of the purchase price within the requisite time period stipulated in the SPA and extended by the vendors. The vendor terminated the transaction and the deposit sum of RM28,171,870 was forfeited by the vendor. Before the termination of the SPA, the plaintiff was already unhappy and dissatisfied with CTY's handling of the BH Suit. The termination of CTY's services was communicated via email dated 14 December 2015 and CTY responded the next day by issuing a legal bill dated 15 December 2015 in the amount of RM2,411,336.58. Unhappy with the said bill, the plaintiff filed legal proceedings about six months later and challenged CTY's legal bill via taxation proceedings at the High Court. In this action, the plaintiff: (a) sought to recover the stamp duty held by CTY and exemplary damages; (b) CTY, whose services terminated on 14 December 2015, was not authorised to apply to LHDN for the refund of the stamp duty and not entitled to retain the same; and (c) CTY acted dishonestly and was in breach of the fiduciary relationship that existed between a solicitor and their client. CTY, on the other hand, argued that: (i) they were specifically instructed to obtain the refund from LHDN in the event that the SPA transaction was aborted or could not be registered; and (ii) in law, they possess a lien over the stamp duty documents and the stamp duty sum in order to protect their legal fees and disbursements.

Held:

(1) The plaintiff had proven that DW1 and CTY were not honest in their dealings with the plaintiff and with the court hearing the taxation originating summons. CTY was clearly not transparent or honest with LHDN. They did not inform LHDN that CTY was no longer the plaintiff's solicitors. DW1 misled LHDN. In his letter to LHDN, DW1 gave them the impression that CTY were still solicitors for the plaintiff. Furthermore, CTY did not inform or alert the plaintiff that they had applied to LHDN for the refund of the stamp duty sum. It was obvious that they did not do so as they were seeking to obtain a refund of the stamp duty sum. It was also clear that all communications pertaining to the plaintiff should have been made to PW1 and PW2 and not sent via a letter to the Pandan Jaya address (see paras 125–126 & 141).

(2) Lien is a passive and possessory right. It is not an active and enforceable right. The lien does not extend to allowing the solicitor to use the documents which are being held under the lien and to make an application to LHDN for refund of the stamp duty sum. This was a blatant misuse or abuse of the lien on CTY's part (see paras 148–149).

(3) Judgment was entered against CTY for the sum of RM8,445,561. The conduct of CTY had done serious damage to the image and reputation of the legal profession in Malaysia. There was nothing in evidence that mitigated CTY's entire and overall misconduct Such conduct necessarily and inherently invited punitive damages. An award of exemplary damages was more than warranted and justified in the present circumstances. Taking all of the facts, factors and circumstances into consideration, a sum of RM250,000 as exemplary damages would be fair, reasonable and equitable and proportionate to CTY's conduct and sufficient to achieve the purpose of deterring CTY or any other solicitor (see paras 159 & 162).

[Bahasa Malaysia summary

Defendan, Chan Tse Yuen & Co ('CTY'), adalah firma guaman yang mewakili plaintif dalam transaksi conveyancing hartanah ('transaksi') dan mengendalikan hal-hal litigasi bagi plaintif yang melibatkan syarikat lain, Beyond Hallmarks Sdn Bhd ('Guaman BH'). Plaintif adalah pembeli bawah transaksi dan pengarahnya ('PW1') membiayai pembelian ini. Alamat yang digunakan dalam urus niaga ini adalah di Pandan Jaya ('alamat Pandan Jaya') dan alamat yang sama digunakan dalam perjanjian jual beli. Transaksi berakhir apabila ditamatkan oleh penjual atas kegagalan plaintif membuat bayaran baki harga belian dalam tempoh masa yang dikehendaki, yang ditetapkan dalam PJB dan dilanjutkan oleh penjual. Penjual menamatkan urus niaga dan jumlah deposit sebanyak RM28,171,870 telah dilucuthakkan oleh penjual. Sebelum penamatan PJB, plaintif tidak berpuas hati dengan pengendalian CTY

terhadap Guaman BH. Penamatan perkhidmatan CTY telah dikomunikasikan melalui e-mel bertarikh 14 Disember 2015 dan CTY memberi respon pada hari berikutnya dengan mengeluarkan satu bil guaman bertarikh 15 Disember 2015 berjumlah RM2,411,336.58. Tidak berpuas hati dengan bil undang-undang tersebut, plaintif memfailkan prosiding undang-undang kira-kira enam bulan kemudian dan mencabar bil guaman CTY melalui prosiding percukaian di Mahkamah Tinggi. Dalam tindakan ini, plaintif: (a) ingin mendapatkan semula duti setem yang dipegang oleh CTY dan ganti rugi teladan; (b) menghujahkan bahawa CTY, yang perkhidmatannya ditamatkan pada 14 Disember 2015, tidak dibenarkan memohon kepada LHDN untuk bayaran balik duti setem dan tidak berhak untuk memegangnya; dan (c) menghujahkan CTY bertindak secara tidak jujur dan melanggar hubungan fidusiari yang wujud di antara peguam dan anak guamnya. CTY, sebaliknya, menghujahkan bahawa: (i) mereka secara khusus diarahkan mendapatkan bayaran balik daripada LHDN sekiranya transaksi SPA telah digugurkan atau tidak didaftarkan; dan (ii) di bawah undang-undang, mereka mempunyai hak atas dokumen duti setem dan jumlah duti setem untuk melindungi yuran sah dan bayaran mereka.

Diputuskan:

(1) Plaintif telah membuktikan bahawa DW1 dan CTY tidak jujur dalam urusan mereka dengan plaintif dan dalam perbicaraan mahkamah yang mendengar saman pemula pungutan cukai. CTY jelas tidak telus atau jujur dengan LHDN. CTY tidak memaklumkan kepada LHDN bahawa mereka bukan lagi peguamcara plaintif. DW1 mengelirukan LHDN. Dalam suratnya kepada LHDN, DW1 memberi mereka gambaran bahawa CTY masih lagi peguam cara plaintif. Selain itu, CTY tidak memaklumkan atau memberitahu kepada plaintif bahawa mereka telah memohon kepada LHDN untuk bayaran balik jumlah duti setem. Adalah jelas bahawa mereka tidak berbuat demikian kerana mereka cuba mendapatkan bayaran balik jumlah duti setem. Jelas juga bahawa semua komunikasi yang berkaitan dengan plaintif sepatutnya dibuat kepada PW1 dan PW2 dan tidak dihantar melalui surat ke alamat Pandan Jaya (lihat perenggan 125–126 & 141).

(2) Lien adalah hak pasif dan pemilikan. Ia bukan hak yang aktif dan boleh dikuatkuasakan. Lien tidak mencapai tahap membenarkan peguam cara menggunakan dokumen yang dipegang bawah lien dan membuat permohonan kepada LHDN untuk bayaran balik jumlah duti setem. Ini salah guna atau penyalahgunaan lien oleh CTY (lihat perenggan 148–149).

(3) Penghakiman dimasukkan terhadap CTY untuk jumlah sebanyak RM8,445,561. Tindakan CTY telah menyebabkan penjejasan serius terhadap imej dan reputasi profesion undang-undang di Malaysia. Tiada

apa-apa dalam keterangan yang memitigasikan penyalahgunaan dan kesilapan keseluruhan tidakan CTY. Tindakan sedemikian semestinya mewajarkan ganti rugi punitif. Award ganti rugi teladan adalah lebih daripada wajar dan wajar dalam keadaan ini. Mengambil kira semua fakta, faktor dan keadaan yang dipertimbangkan, sejumlah RM250,000 sebagai ganti rugi teladan adalah adil, munasabah dan saksama dan seimbang dengan kelakuan CTY dan mencukupi untuk mencapai tujuan menghalang CTY atau mana-mana peguamcara lain (lihat perenggan 159 & 162).]

Notes

For cases on solicitor-client relationship, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2258–2262.

Cases referred to

Agrokor Sdn Bhd v Perkayuan TM (Malaysia) Sdn Bhd [2015] MLJU 961; [2015] 6 CLJ 594, HC (refd)

Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal [2012] 4 MLJ 72; [2013] 2 CLJ 734, CA (refd)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)

Beyond Hallmark Sdn Bhd v Leong Tuck Onn & Anor [2017] MLJU 1311; [2017] MLJU 1315, HC (refd)

Chan Tse Yuen & Co v Yap Chin Gaik, Elaine & Ors [2017] MLJU 1459; [2018] 1 AMR 34; [2017] AMEJ 1467; [2017] 1 LNS 1409, HC (refd)

Galland, In Re (1885) 31 Ch D 296, CA (refd)

Jameel (Yousef) v Dow Jones & Co Inc [2005] QB 946, CA (refd)

Lady De La Pole v Dick (1885) 29 Ch D 351, CA (distd)

Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1; [2009] 6 CLJ 626; [2009] 1 LNS 866, CA (refd)

Long, Re [1885] 31 Ch D 296, CA (refd)

Messrs Roland Cheng & Co v Konkamaju Sdn Bhd [2014] 1 MLJ 894, CA (refd)

PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (folld)

Rookes v Barnard [1964] AC 1129, HL (refd)

S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor [2010] MLJU 2218; [2011] 1 CLJ 460, CA (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (folld)

Wan Rohimi bin Wan Daud dan satu lagi lwn Abdullah bin Che Hassan & 270 Yang Lain dan satu lagi rayuan [2015] MLJU 2190; [2016] 4 CLJ 125, CA (refd)

Withers LLP v Langbar International Ltd [2012] 2 All ER 616, CA (refd)

Wong Shui Kee Roger v Victor Chu & Co (a firm) [2003] 1 HKC 125, HC (refd)

Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in

liquidation) [2011] 4 MLJ 161, CA (refd)

Legislation referred to

Evidence Act 1950 ss 73A, 103, 114(g)
Industrial Relations Act 1967 s 20
Legal Profession Act 1976 ss 126, 129, 130, 132
National Land Code Form 14A
Rules of Court 2012 O 64
Solicitors Account Rules 1990 r 7
Solicitors' Remuneration Order 2005 para 2(a), 2(f), First Schedule
Stamp Act 1949 s 57, 57(a)

Gopal Sreenevasan (Conrad Young with him) (Sreenevasan Young) for the plaintiff.
Chan Tse Yuen (Chan Tse Yuen & Co) for the defendant.

Nantha Balan J:

INTRODUCTION

[1] These are my grounds after a full trial. The plaintiff's case is essentially predicated on serious allegations of impropriety against the defendant, who were their former conveyancing solicitors. The allegations include breach of trust, breach of fiduciary duty, misappropriation of client's monies, lack of transparency and blatant dishonesty. The allegations against the defendant are grave and they raise several imperative questions concerning a solicitor's conduct. Briefly, they are:

(a) whether by virtue of ruling 16.01(4) of the Rules and Ruling of the Bar Council Malaysia, a conveyancing solicitor whose services has been terminated and whose fees and disbursements have not been settled by the former client, remains 'undischarged' as the solicitor in the conveyancing transaction?

(b) whether by virtue of ruling 16.01(4) of the Rules and Ruling of the Bar Council Malaysia, a conveyancing solicitor whose services have been terminated by the client has a 'solicitor's lien' over the transaction documents which are in the possession of the said solicitor?

(c) whether a conveyancing solicitor whose services have been terminated by the client may, after his services have been terminated, act on any pre-termination instructions of the client and continue to perform functions and carry out acts vis a vis the conveyancing transaction?

(d) whether pursuant to a solicitor's lien, a conveyancing solicitor whose services have been terminated by the client, may unilaterally use the transaction documents which are covered by the lien, to apply to the

collector of stamp duty for refund of the requisite ad valorem stamp duty for a conveyancing transaction which had been aborted? A

(e) whether a solicitor's lien over documents is a passive and possessory right and gives the solicitor no enforceable rights vis a vis the transaction documents? B

(f) whether a solicitor who unilaterally uses the transaction documents, which are covered by a solicitor's lien for his fees and disbursements, to apply to the collector of stamp duty for a refund of the stamp duty and receives the refund, continues to have a solicitor's lien over the monies which are received by the solicitor? C

(g) whether monies which are paid towards a conveyancing transaction in the form of ad valorem stamp duty which are refunded to the former solicitors (after the transaction has been aborted) are 'client's monies' which are to be held in trust by the solicitor? D

(h) whether a solicitor whose legal bill is being taxed by his former client in ongoing legal proceedings may, without the former client's authorisation, deduct a portion of their fees from the stamp duty which had been refunded to them by the collector of stamp duty? and E

(i) whether a solicitor whose services had been terminated and whose legal bill is being taxed by his former client is deemed to have misappropriated client's monies or acted in breach of trust, if he, without the former client's authorisation, deducts a portion of his fees from the stamp duty (which was previously paid by the client for the conveyancing transaction) which had been refunded to the solicitor by the collector of stamp duty? F

[2] The defendant in this action is the legal firm of Messrs Chan Tse Yuen & Co. For the sake of brevity, I shall refer to the defendant as 'CTY'. The principal partner of CTY is Mr Chan Tse Yuen ('DW1'), an advocate and solicitor with about 17 years of experience in litigation and conveyancing practice. The plaintiff is a private limited company which is incorporated in Malaysia. The plaintiff is essentially owned by investors from Hong Kong and China. However, as far as records are concerned, the main shareholder of the plaintiff is a company incorporated in the British Virgin Islands. The plaintiff was keen to invest in Malaysian property. The plaintiff wanted to purchase a substantial parcel of landed property in Kuala Lumpur. The plaintiff was introduced to DW1 through one Tan Sri Dato' Ong Tee Keat ('DW3'). DW3 is a former politician and now a businessman. DW3 was a director and shareholder of the plaintiff at the material time. DW3's nephew, Ong Shu Woei ('OSW') was also a shareholder and director of the plaintiff. DW1 and DW3 were close friends. Through DW3's introduction, CTY became the plaintiff's conveyancing solicitor in a sale and purchase transaction which was terminated by the vendor. G H I

A The termination of the sale and purchase transaction was not due to any act or omission on the part of CTY.

B **[3]** As the purchaser of the property, the plaintiff had duly paid the requisite ad valorem stamp duty for the sale and purchase transaction. The plaintiff's claim against CTY is for, inter alia, a declaration that they are liable to account to the plaintiff for the stamp duty sum of RM8,445,561 which was received by CTY from the collector of stamp duties, being the refund of stamp duties paid under Stamp Duty Adjudication Certificate No H01M189545-W025. The C plaintiff seeks to obtain, inter alia, judgment against CTY in the sum of RM8,445,561 ('the stamp duty sum'). The present suit was filed on 19 December 2016. The plaintiff also seeks exemplary damages on account of CTY's alleged dishonest and egregious conduct.

D **[4]** The starting point in this dispute is CTY's conduct in applying to the Lembaga Hasil Dalam Negeri ('LHDN') for refund of the stamp duty sum, after CTY had been terminated as the solicitors in the conveyancing transaction. According to the plaintiff, CTY had applied to LHDN for a refund of the stamp duty sum, without the plaintiff's permission or knowledge. E It is alleged that the application to LHDN was done surreptitiously and dishonestly. It is alleged that CTY had misrepresented to LHDN that they were still acting for the plaintiff when they made the application for the refund of the stamp duty sum. It is also alleged that after the stamp duty sum had been refunded by LHDN, CTY had misappropriated a part of the stamp duty sum F which CTY had unilaterally taken as part payment of their fees/disbursements (which the plaintiff was disputing all along).

[5] CTY then kept the balance of the stamp duty sum in fixed deposit accounts, apparently on the instructions of DW3 (together with OSW) who G had issues of his own vis a vis his shareholding and directorship in the plaintiff. It is alleged that CTY's conduct in this regard was dishonest and displayed a lack of transparency. It is alleged that CTY were in breach of fiduciary duties as solicitors towards the plaintiff, their former client. There are various other aspects of CTY's conduct which formed part of the narrative and which also H (allegedly) displayed a lack of transparency or honesty on the part of CTY. I will deal with all of these matters in the later part of this judgment.

[6] The trial was conducted before me on 16 and 17 November 2017. The plaintiff's witnesses were Felix Wong Sin Hua (a director of the plaintiff) I ('PW1') and Ellen Huang Jiefan (a director of the plaintiff and personal assistant to PW1) ('PW2'). PW1 and PW2 were at all times physically based in Hong Kong. Their communication with CTY, DW1 and DW3 were always through emails. The defendant's witnesses were Mr Chan Tse Yuen (the main partner of CTY) ('DW1'), Puan Suriyati bt Abdullah (a senior officer from

LHDN) ('DW2') and Tan Sri Dato' Ong Tee Kiat ('DW3') (a former shareholder and director of the plaintiff — but this is disputed as he maintains that he was unlawfully stripped of his shareholding and is seeking remedies in a separate suit, namely, Kuala Lumpur High Court Suit No WA22NCVC-42–02 of 2017 — 'Suit 42').

BACKGROUND FACTS

[7] CTY is a law firm and they represented the plaintiff in a multimillion ringgit real estate conveyancing transaction. At the same time, they also handled a litigation matter for the plaintiff involving another company (owned or controlled by PW1), namely Beyond Hallmark Sdn Bhd via *Beyond Hallmark Sdn Bhd v Leong Tuck Onn & Anor* [2017] MLJU 1311; [2017] MLJU 1315 ('Beyond Hallmark Suit'). PW1 and PW2 were in constant communication with DW1 over the *Beyond Hallmark* suit as well as the conveyancing transaction which is the subject matter of the present suit. The *Beyond Hallmark* suit had nothing to do with the conveyancing transaction.

[8] The plaintiff was the purchaser under the said real estate conveyancing transaction. The funding for the property purchase came from PW1. It is alleged that the purchase monies actually emanated from investors in China and that PW1 was merely fronting for the investors from mainland China. That may well be the case, but it is quite irrelevant to the issues under consideration in the present case. What is relevant is that PW1 was the source for the funding of the property purchase. The plaintiff's former name is Fantastic Megaway Sdn Bhd (Company No 1143510-P) and the address that was used for the real estate conveyancing transaction is No 15C, Jalan Pandan 3/5, Pandan Jaya, 55100 Kuala Lumpur ('the Pandan Jaya address').

[9] Ordinarily, the detail pertaining to the plaintiff's address would be rather mundane, but in this case the Pandan Jaya address of the plaintiff played an important role in the narrative. The former name of the plaintiff and the Pandan Jaya address appear in the sale and purchase agreement dated 30 July 2015 ('the SPA') and in the other transaction documents such as the memorandum of transfer (Form 14A) ('the MOT'). DW3 and OSW were directors and shareholders in the plaintiff at the material time. Later, they resigned as directors and ceased to be shareholders and directors of the plaintiff. But this is a contentious issue in Suit 42 (not to be confused with the *Beyond Hallmark* suit). I will say no more about these suits. But it is relevant that the Pandan Jaya address is also the business address of DW3. DW3's staff or aide who handled his maters was one Sapina Saad (who did not testify during the trial). OSW also did not testify in the trial, although he was listed as a witness in CTY's list of witnesses. The plaintiff made much of the fact that OSW was absent from the witness box and there was no explanation by CTY as to why

A OSW did not come to court to testify on behalf of CTY. As such, the plaintiff asked that an adverse inference be drawn against CTY for the failure to call OSW as a witness or to render a credible explanation for his absence. The plaintiff also asked that an adverse inference be drawn for CTY's failure to call their staff one Siew May, who was present in court on the first day of the trial. B Both OSW and Siew May were importance witnesses who could have shed light on the genesis and authenticity of a purported letter dated 3 November 2015 (marked as 'ID-D1').

C **[10]** The SPA was dated 30 July 2015. However, the conveyancing transaction came to an abrupt end *on 27 January 2016* as it was *terminated by the vendor* due to the plaintiff's failure to make payment of the balance of the purchase price within the requisite time period as stipulated in the SPA and as extended by the vendors (19 January 2016) (see: letter dated 27 January 2016 D — from Messrs Amir, Lim & Partners at p 110, B1). The vendor terminated the SPA transaction and the deposit sum of RM28,171,870 was forfeited by the vendor.

[11] Before the SPA was terminated, the plaintiff were already unhappy and E dissatisfied over CTY's handling of the *Beyond Hallmark* suit and they therefore terminated CTY's services in respect of all matters which CTY was handling and this included the conveyancing transaction. The termination of CTY's services took place by way of an email dated 14 December 2015 which was sent by PW2 (on behalf of PW1) to CTY. CTY responded immediately. They sent F a letter dated 15 December 2015 and issued a legal bill dated 15 December 2015 for services rendered and disbursements incurred for the conveyancing transaction, all totalling RM2,411,336.58. CTY's said letter and legal bill was addressed to Fantastic Megaway Sdn Bhd (Company No 1143510-P). The plaintiff's address which was stated in the letter was the Pandan Jaya address.

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[12] But, CTY's said letter and the legal bill were sent by email to all the directors of the plaintiff. Indeed, the sending of documents such as letters etc. was always through email. Hence, there was no doubt that this was the usual and established practice of communication between the plaintiff, CTY (DW1) H and DW3. The said legal bill comprised of a sum of RM1,136,324.80 as professional fees for the SPA transaction and transfer of the subject land and a further sum of RM1,136,324.80 for 'negotiations' of the SPA. The rest of the items were disbursements and a sum of RM500 for drafting of directions and shareholders resolution. The plaintiff was not happy with the legal bill. They I did not settle the said legal bill which was issued by CTY. The plaintiff subsequently filed legal proceedings about six months later and challenged CTY's legal bill via taxation proceedings in the High Court. In this regard, the plaintiff retained Messrs Wong & Partners to handle the taxation matter on their behalf. There is no explanation for the plaintiff's delay in challenging

CTY's legal bill. It is now appropriate for me to refer to the plaintiff's case synopsis.

THE PLAINTIFF'S SYNOPSIS

[13] At all material times, CTY was the solicitor for the plaintiff in a sale and purchase transaction for purchase of the land described as No Hakmilik Pajakan Negeri (WP) 51541, Lot No 11979, Mukim Ampang, Daerah Kuala Lumpur, Wilayah Persekutuan ('the Ampang land') from BJ Properties Sdn Bhd ('the vendor') for the sum of RM281,718,700. The SPA is dated 30 July 2015. I shall generally refer to the transaction for the purchase of the Ampang land generically as ('the SPA transaction'). By the present suit, the plaintiff seeks to recover the stamp duty sum which is currently held by CTY. The plaintiff also seeks to obtain exemplary damages against CTY by reason of CTY's alleged unauthorised acts and/or dishonest conduct. The stamp duty sum was paid by the plaintiff as the ad valorem stamp duty which was adjudicated by the collector of stamp duty for the SPA transaction. The SPA transaction was terminated by the vendor via letter dated 27 January 2016 issued by the vendor's solicitors, Messrs Amir Lim & Partners. As such, in the ordinary course of events, the solicitors for the purchaser would have made the requisite application to LHDN for refund and stamp duty sum would have been refunded to the plaintiff. However, the situation here was far from ordinary. In fact it was complicated. The complication here was that with effect from 14 December 2015, CTY's services had been terminated and they ceased to be the plaintiff's solicitors in the SPA transaction.

[14] The dispute here originates from the fact that notwithstanding that CTY's services were terminated on 14 December 2015 (before the termination of the SPA transaction), CTY had applied to LHDN for the refund (in or around 15 February 2016) and this was allegedly done surreptitiously and dishonestly by CTY. On 18 July 2016, CTY received the refund of the stamp duty sum and the monies were credited into CTY's 'client account' on 19 July 2016 (p 5, B3).

[15] It is the plaintiff's case first that CTY, whose services were terminated on 14 December 2015, was not authorised to apply to LHDN for the refund of the stamp duty sum and secondly, CTY were not entitled to retain the same and thirdly, CTY were not entitled to make any deductions whatsoever from the stamp duty sum that was refunded by LHDN. The plaintiff contends that CTY knew that the plaintiff intended to seek for the refund themselves through the proceedings commenced by the plaintiff to tax CTY's legal bill dated 15 December 2015 in Kuala Lumpur High Court Originating Summons No WA-24NCvC-874–06 of 2016 ('the taxation OS'). It is alleged by the plaintiff that CTY did not disclose to the court hearing the taxation OS

A that CTY had applied for the refund, that the stamp duty sum had been refunded, that CTY had made deductions from the stamp duty sum and kept the balance in fixed deposit accounts.

B **[16]** At all material times, CTY was in possession and custody of the original memorandum of transfer ('MOT'), the original notice of adjudication of stamp duty (Adjudication No H01M189545-W025) ('the stamp duty notice') and the original stamp certificate ('stamp certificate'). For brevity, the MOT, the stamp duty notice and the stamp certificate shall be collectively referred to as ('the stamp duty documents'). It is common ground that the stamp duty C documents are necessary in order to make an application to LHDN for a refund of the stamp duty sum. It is also not in dispute that under proviso (a) of s 57(f) of the Stamp Act 1949 the application for refund of stamp duty for an aborted conveyancing transaction must be made within twelve months from D the date of the instrument which was intended to be used for the transaction, failing which the stamp duty sum would be forfeited by LHDN. In this case, the stamp duty sum was levied on the MOT which is dated 22 September 2015 and as confirmed by DW2, the last date to make an application for refund of the stamp duty sum would be 21 September 2016. DW1 maintains that E although CTY's services were terminated on 14 December 2015 in law, they were still not 'discharged' and CTY did the plaintiff a huge favour by applying for refund of the stamp duty sum because if the application is not made before 21 September 2016, then the stamp duty sum will be forfeited by LHDN and the party (the plaintiff) which paid these monies will have no legal recourse to F recover the stamp duty sum thereafter.

[17] CTY also maintains that they have a 'solicitor's lien' over the stamp duty documents and that their lien would be lost forever if they had not timeously applied to LHDN for the refund. But, the plaintiff contends that CTY did not G inform them that they were going to apply or had applied to LHDN for refund of the stamp duty sum or that it had been refunded to CTY. The plaintiff only discovered that CTY had made the application and had received the refund of the stamp duty sum, sometime on or around 29 November 2016 when their solicitors Messrs Wong & Partners made enquiries with LHDN. According to H the plaintiff, even in the papers filed in the taxation OS, CTY made no mention of the fact that they applied to LHDN in February 2016 and received the refund into their account on 19 July 2016. To date, CTY has refused to refund the entire sum of RM8,445,561 or any part thereof to the plaintiff.

I **[18]** It is significant to note that although the SPA transaction was terminated, PW1 testified that as far as he was concerned, the SPA transaction was not aborted or terminated and that the plaintiff was still in discussion with the vendor to keep the SPA transaction alive. In this regard, DW1 confirmed during cross-examination that after CTY's services were terminated, he had

heard from others that the plaintiff had approached the vendors in order to salvage the SPA transaction. He said he could not remember when exactly he heard of these discussions but it was not too long after the SPA had been terminated.

[19] Although the point was not explored during the trial, it would appear that despite knowing of the plaintiff's attempt to salvage the SPA transaction, CTY nevertheless went ahead and applied for the refund of the stamp duty sum. Essentially by applying to LHDN for a refund of the stamp duty, all hopes of reviving the terminated SPA transaction would have effectively been scuttled. But, I have reminded myself that that is not the plaintiff's issue with regard to CTY's conduct. The issues are far more sinister. Hence, the plaintiff contends that CTY has acted dishonestly and at any rate in breach of the fiduciary relationship that exists between a solicitor and their client (or former client), in applying for and retaining the stamp duty sum and unilaterally deducting part of the sum as their fees and disbursements. Alternatively, it is alleged that CTY received the stamp duty sum as money had and received to the plaintiff's use. The plaintiff accordingly commenced this action to claim, inter alia, for recovery of the stamp duty sum and for exemplary damages plus interest and costs.

CTY'S SYNOPSIS

[20] CTY contends that at all material times, they were the solicitors for the plaintiff in the SPA transaction and that they received the plaintiff's Malayan Banking Bhd bankers cheque No 035062 for RM8,445,561 being the payment of the ad-valorem stamp duty sum and that they were specifically instructed to obtain the refund from LHDN in the event that the SPA transaction is aborted or cannot be registered for any reason whatsoever.

[21] In this regard, CTY relied on the plaintiff's purported instruction contained in a letter dated 3 November 2015 (marked as 'ID-D1' during the trial). I should mention that this is a disputed document. Besides the SPA transaction, CTY was handling other matters for the plaintiff. In particular CTY handled the *Beyond Hallmark* suit for PW1. PW1 was not happy with CTY's handling of the *Beyond Hallmark* suit. Prior to termination of CTY's services on 14 December 2015, PW1 had no issue with CTY's handling of the SPA transaction. In fact, according to DW1, it was because of his efforts that the vendor agreed to give the plaintiff an extension of time for the payment of the earnest deposit. At any rate, because of PW1's dissatisfaction over CTY's handling of the *Beyond Hallmark* suit on 14 December 2015, PW2 sent an email to CTY terminating CTY's services for all legal matters. The email reads, inter alia, as:

> Due to your intentional delay on transferring files of the *Beyond Hallmark Sdn Bhd*

> *vs Leong Tuck Onn* legal suit, *we hereby to inform you to stop all our transactions/cases that are currently handled by your office as per Mr Felix Wong's instruction.*
>
> Our new solicitors will contact and liaise with you in order to take over all the cases and files from your firm. Please cooperate with our new solicitors and take any actions necessary to assist in handing over all the files/transactions.
>
> Should you refuse to cooperate and result in delay or damage of the transaction(s), you will be held liable for all the losses caused.
>
> Regards,
>
> Ellen on behalf of Felix Wong
>
> Director of M Wealth Corridor Sdn Bhd
>
> Director of Beyond Hallmark Sdn Bhd.
>
> (p 182, B1) (Emphasis added.)

[22] There is no dispute that the plaintiff's said email was a clear and unambiguous instruction to CTY to stop acting in all matters and that their services were being terminated. According to CTY, the question of 'terminating the services of the defendant' could never arise as it had been taken over by events in that the SPA transaction and all professional works in relation thereto had already been completed, leaving only the formal 'clerical' work of presenting the MOT for the transfer of the land into the name of the purchaser. According to CTY, they are entitled to full scale fees under the Solicitors' Remuneration Order 1990. They maintain that as a matter of fact, the plaintiff was in default under the SPA transaction and could not pay the balance of the purchase price. On 27 January 2016, CTY received the letter of termination of the SPA transaction from the vendor's solicitors and promptly informed all directors of the plaintiff of the termination of the SPA transaction and of the forfeiture of the deposit by the vendor. DW1's email to the plaintiff dated 27 January 2016 (p 4, B2) reads as follows:

> We forward herewith the letter from the vendor's solicitors to us dated 27.1.2016 for your attention.
>
> TAKE NOTE that the vendor in exercising its rights under the provisions of the SPA, had terminated the SPA and forfeited the RM28.1 millions deposit.

[23] CTY contends that in law they possess a lien over the stamp duty documents and the stamp duty sum which had been refunded, in order to protect their legal fees and out of pocket disbursements. CTY contends that the plaintiff had been duly informed of the refunded stamp duty through letters and also by way of an affidavit (encl 6) filed in the taxation OS. CTY avers that the plaintiff has no locus standi to commence this action as its other two directors, namely DW3 and OSW did not sanction the commencement of this action against the defendants (but I note that this point appears to have been

abandoned sub silentio during the trial).

THE ISSUES

[24] Before commencement of the trial, the parties formulated the following main issues for trial:

(a) whether the letter dated 3 November 2015 by the plaintiff, when it was known as Fantastic Megaway Sdn Bhd ('ID-D1') is a genuine letter issued contemporaneously with the handing over of the Malayan Banking Bhd banker's cheque for RM8,445,561?

(b) if the said letter dated 3 November 2015 is genuine then whether CTY was entitled to apply to LHDN for refund of the stamp duty sum on 15 February 2016 albeit that CTY was no longer the solicitor for the plaintiff vis a vis the SPA transaction? and

(c) assuming that CTY was entitled to make the application for the refund of the stamp duty sum, then whether they could lawfully deduct a sum of RM1,183,549.21 and withhold the balance in fixed deposit accounts whilst CTY was aware that the plaintiff was challenging its bill via the taxation OS?

CHRONOLOGY OF EVENTS

[25] The chronology of events are as follows:

No	Date	Event
1	30 July 2015	Sale and purchase agreement ('SPA') for the plaintiff's purchase of land (Lot 11979) for RM281,718,700 ('transaction') (pp 3–19, B1).
2	9 October 2015	Notis Taksiran Pindah Milik Harta Tanah issued by LHDN (Ad valorem stamp duty assessment notice) (pp 51–52, B1).
3	22 September 2015	Form 14A (memorandum of transfer) for the transaction executed by the plaintiff and vendor ('MOT') (pp 38–41, B1).
4	22 September 2015	Sijil Setem issued by LHDN for ad valorem stamp duty sum RM8,445,561 (p 74, B1)
5	3 November 2015	Letter issued by the plaintiff (signed by Ong Shu Woei) instructing CTY to seek a refund if the transaction is aborted (the authenticity of the letter is disputed by the plaintiff) (p 1, B4).

No	Date	Event
6	3 November 2015	Stamp duty of RM8,445,561 paid by the plaintiff to the collector of stamp duties ('stamp duty').
7	10 December 2015	DW3 sent email to CTY directing that all matters regarding legal cases be addressed to PW1 in Hong Kong (p 7, B4)
8	14 December 2015	PW2's email to CTY — the services of CTY as solicitors for the plaintiff and Beyond Hallmark Sdn Bhd were terminated (p 92, B1).
9	15 December 2015	CTY issued letter dated 15 December 2015 and bill No 03774 for the sum of RM2,411,336.58 ('Bill') to the plaintiff (pp 93–97, B1)
10	16 December 2015	DW3 sent email to Felix Wong ('PW1') resigning as director of all companies incorporated by PW1 and for his shareholding to be transferred. He also asked that his name be removed as signatory to the bank accounts. DW3 also instructed that the plaintiff cease operations at Pandan Jaya address (pp 104–105, B1).
11	4 January 2016	OSW (copied to DW3, PW1, PW2) sent email to Stephen (company secretary) — resigning as director and ceasing as shareholder of, inter alia, the plaintiff (p 109, B1).
12	27 January 2016	The vendor's solicitors wrote to CTY informing that the SPA transaction has been terminated and the deposit of RM28,171,870 forfeited (p 110, B1). CTY sent an email to the plaintiff enclosing the vendor's solicitors' letter dated 27 January 2016 (p 4, B2).
13	29 January 2016	CTY's letter to plaintiff demanding payment or else CTY 'will take all lawful actions to protect our interests' (p 113, B1).
14	15 February 2016	CTY applied to the LHDN for refund of the stamp duty sum (pp 114–138, B2).

No	Date	Event
15	29 February 2016	The vendor sent an email to the plaintiff notifying that the SPA had been terminated and that there was no intention to negotiate further (p 191, B1).
16	2 June 2016	The plaintiff applied to High Court via Originating Summons No WA-24NCVC-874–06 of 2016 for an order to tax the legal Bill and for the return of documents ('taxation proceedings'). (CTY was represented by Messrs Chew Biman) (pp 221–228, B1) (the cause papers were served on CTY shortly thereafter).
17	17 June 2016	Letter issued by LHDN to CTY in relation to CTY's application for refund of stamp duty sum (p 229, B1).
18	18 July 2016	CTY received the refund of the stamp duty sum of RM8,445,561 (credited to CTY's Public Bank client's account on 19 July 2016 — p 5, B3).
19	21 July 2016	CTY wrote to the plaintiff (sent by registered post to the Pandan Jaya address) and informed that the stamp duty sum had been received and deductions made. The letter was received by DW3's staff, Sapina Saad. It was not sent by email to PW1 or PW2 (who were in Hong Kong) (pp 231–233, B1). DW3 or Sapina Saad did not forward or email the letter to PW1 or PW2.
20	25 July 2016	Messrs Sunita Osaman (acting for DW3 and OSW) wrote to CTY and warned them not to release the balance of the stamp duty sum to the plaintiff as there were disputes over directorship and shareholding within the plaintiff (p 234, B1).
21	November 2016	The plaintiff finds out that CTY had applied for and received the refund of the stamp duty sum (pp 258–259, B1).
22	30 November 2016	The plaintiff issued letter of demand to Messrs Chew Biman and complained about CTY's conduct and asked for the return of the refunded stamp duty sum (pp 256–259, B1).

No	Date	Event
23	1 December 2016	Messrs Chew Biman responded to say that letter should not have been sent to them as they were only acting for CTY in the taxation OS (p 260, B1).
24	1 December 2016	The plaintiff's solicitors issued a letter to CTY (enclosing the earlier letter dated 30 November 2016 and Messrs Chew Biman's response dated 1 December 2016 (p 261, B1).
25	8 December 2016	CTY responded to the plaintiff's letter of demand via its solicitors, Tan Goh & Assoc, but did not pay over the refunded stamp duty sum to the plaintiff.
26	19 December 2016	The present suit was filed by the plaintiff.
27	15 December 2016	CTY filed Suit No 23NCVC-58–12 of 2016 (defamation suit) against Messrs Wong & Partners, Elaine Yap and the plaintiff.
28	12 July 2017	Defamation suit was struck out and dismissed.

[26] I turn now to the termination of CTY's services. On 14 December 2015, the plaintiff terminated CTY's services in respect of, inter alia, the SPA transaction. The very next day, CTY issued a bill dated 15 December 2015 in the sum of RM2,411,336.58 for services rendered ('CTY's bill').

[27] The defendant's covering letter dated 15 December 2015 reads as:

> Further to *your termination of our services as your solicitors in the above transaction on 14 December 2015, we forward herewith our Notes of Professional Charges dated 15 December 2015* for your attention ...
>
> *Upon your full settlement* of our professional charges/disbursements, *we shall promptly forward all relevant documents in the above transaction at your Malaysian office.*
>
> (p 93, B1) (Emphasis added.)

[28] The plaintiff disputed CTY's legal bill on the ground that it was excessive and/or unreasonable. However, there is no formal letter or email from the plaintiff stating that they are disputing the bill. But it is common ground that the plaintiff did not agree to the amounts stated in CTY's legal bill. Thus, CTY's legal bill remained unpaid to date. And in response to the plaintiff's refusal to settle CTY's legal bill dated 15 December 2015, CTY refused to release the documents in respect of the SPA transaction (which included the

MOT and the stamp certificate) on the basis of a solicitors' lien. The next event which happened is that around 27 January 2016, the vendor's solicitors, Messrs Amir Lim & Partners informed CTY that the vendors had terminated the SPA, as the balance of the purchase price under the SPA was unpaid.

[29] The letter from Messrs Amir Lim & Partners dated 27 January 2016 reads as follows:

> We refer to the above matter, to your letter dated 22/09/2015 and to our letters dated 01/12/2015, 03/12/2015 and 14/12/2015 (2 letters).
>
> We have been instructed to state as follows:
>
> (1) The Extended Completion Date expired on the *19/01/2016*.
>
> (2) That the Purchaser did not settle the Balance Purchase Price within the Extended Completion Date.
>
> (3) That the Sale and Purchase Agreement is therefore deemed terminated by your client's act of default on the 20/01/2016 and the Deposit forfeited accordingly.
>
> (4) That the Vendor did not agreed to any waiver nor granted any indulgence whatsoever to the Purchaser.
>
> (p 110, B1)

[30] CTY forwarded the letter from Messrs Amir Lim & Partners to the plaintiff via a covering letter dated 27 January 2016 (to its Pandan Jaya address) but which was in fact sent via an email (p 4, B2) and it reads:

> We forward herewith the letter from the vendor's solicitors to us dated 27.1.2016 for your attention.
>
> TAKE NOTE that the vendor in exercising its rights under the provisions of the SPA, had terminated the SPA and forfeited the RM28.1 millions deposit.

[31] In this regard, it is interesting that on the one hand CTY maintains that the plaintiff did not wish to have communication with CTY and did not respond to CTY's letter dated 15 December 2015 (enclosing CTY's legal bill), yet they forwarded the letter from Messrs Amir Lim & Partners via email to the plaintiff in Hong Kong and also sent a letter dated 29 January 2016, which although refers to the Pandan Jaya address, was nevertheless *emailed to PW1* (see: p 113, B1). The letter dated 29 January 2016 reads as:

> Fantastic Megaway Sdn Bhd
> 15C, Jalan Pandan 3/5 BY EMAIL
> Pandan Jaya, 55100 Kuala Lumpur
> (Kind Attn: All Directors) 29th January 2016

A Re:

Property: No. Hakmilik Pajakan Negeri (WP) 51541, Lot No. 11979, Mukim Ampang, Daerah Kuala Lumpur, Wilayah Persekutuan [the property]

Vendor: BJ Properties Sdn Bhd

B Purchaser: Fantastic Megaway Sdn Bhd

Purchase Price: RM28,718,700.00

REMINDER ON: LONG OUTSTANDING FEES DUE AND OWING TO US

C With reference to our Bill No. 03774 dated 15 December 2015 [the Bill], we noted that you have yet to pay any money towards our professional charges for the works rendered and out of pocket money paid on your behalf.

You had been advised that pursuant to Order 5 of the Solicitors Remuneration Order 2015, after the expiry of ONE month from the date of the Bill, we are D entitled to charge interests on the outstanding payment at the rate of 8% per annum until full payment.

The calculation of the 8% interests are set out below:-

RM2,411,336,56 X 8%/365 days = RM528.51 per day

E Therefore, interests on the outstanding fees calculated from 14.1.2016 to 29.1.2016 is RM7,927.65 (RM528.51 X 15 days; and still continuing up to the date of full payment).

Since the vendor had terminated the SPA on 27.1.2016 and forfeited your deposit sum of RM28.1 millions, we believe you would appreciate that *we shall take ALL* F *lawful actions to protect our interests.*

Meanwhile we reiterate, again that ALL your letters to us MUST be on your letterheads bearing authorized signatures; otherwise we shall continue to adhere to our policy of NOT responding thereto.

G (p 113, B1) (Emphasis added.)

[32] Quite clearly, CTY was aware that despite the termination and DW3's directive not to use the Pandan Jaya address, CTY's letter dated 29 January 2016, although states that it is addressed to the Pandan Jaya address, was in fact H emailed by CTY to PW1 who was in Hong Kong.

[33] I turn now to the refund of the stamp duty sum. Since the SPA was terminated, the plaintiff wanted to seek a refund of the stamp duty sum. It is not in dispute that in order to apply to LHDN for a refund of the stamp duty I sum, the MOT and stamp duty certificate are needed. However, the stamp duty documents were with CTY, and there was a stalemate between the plaintiff and CTY as regards CTY's legal bill.

[34] And so, CTY declined to release the documents, which included the

MOT and stamp duty certificate. CTY held on to the stamp duty documents as they had a solicitors lien over these documents. In this regard, DW1 said during the trial that after he issued the legal bill, the plaintiff did not want to communicate with CTY. PW1 also confirmed in cross-examination that he did not want to communicate with CTY after their services had been terminated.

[35] But, there is nothing to suggest that the plaintiff did not wish to receive any communications from CTY or be informed of any matters which would affect their legal rights or interests, particularly on the matter pertaining to refund of the stamp duty sum. Eventually, in so far as the refund of the stamp duty sum and CTY's legal bill are concerned, the plaintiff instructed Messrs Wong & Partners to file taxation proceedings to tax CTY's legal bill and to obtain an order to compel CTY to return all the transactional documents. I turn now to the taxation proceedings.

THE TAXATION PROCEEDINGS

[36] On or around 30 May 2016, Messrs Wong & Partners were appointed by the plaintiff to take the necessary steps to file legal proceedings to challenge and dispute the quantum of CTY's legal bill and compel them to return the relevant documents relating to the aborted property transaction, which includes the stamp duty documents.

[37] On 2 June 2016, Messrs Wong & Partners filed the taxation OS for an order pursuant to ss 126, 129, 130 and 132 of the Legal Profession Act 1976 to tax CTY's legal bill and for CTY to deliver up the transactional documents, including the stamp duty documents to the plaintiff. Very soon thereafter, the cause papers for the OS were served on CTY. The exact date of service of the taxation OS on CTY was not made clear but DW1 admitted that it was served very soon after it was filed.

[38] At any rate, it is not in dispute that when the taxation OS was served, CTY had already applied to LHDN for the refund of the stamp duty sum and whilst the proceedings were on-going, CTY received the refund of the stamp duty sum, which was credited into their clients account on 19 July 2016. Messrs. Chew Biman acted for CTY in the taxation OS. The reliefs sought by the plaintiff in the taxation OS are:

(a) an order for CTY's Bill to be taxed ('the taxation relief'); and

(b) an order that CTY delivers to the firm all papers, instruments, notices, certificates and/or other documents, relating to the sale and purchase transaction in the custody and power of CTY ('the release of documents relief').

[39] DW3 and his nephew (OSW) successfully intervened in the taxation OS, but the High Court's order of intervention was eventually set aside on appeal by the plaintiff to the Court of Appeal. Thus, DW3 and his nephew (OSW) had and have no role in the taxation OS. To date, the taxation proceedings have not been disposed off.

DISCOVERY OF THE CTY'S CONDUCT

[40] According to the plaintiff, whilst the taxation OS was on-going they discovered (sometime in November 2016 through letters written by Wong & Partners to LHDN) that in February 2016, CTY had applied to LHDN for the refund of the stamp duty sum and that it was paid to CTY in July 2016. This is borne out by the correspondence between Messrs Wong & Partners and LHDN (see pp 245–256, B1). It is alleged by the plaintiff that CTY did not disclose to the court in the taxation OS that they had applied to LHDN in February 2016 for refund of the stamp duty sum and/or that the stamp duty sum had been paid into their client's account on 19 July 2016. At any rate, it cannot be denied that CTY did in fact make the application to LHDN on 15 February 2016 for refund of the stamp duty sum. Thus, in terms of chronology, the application for refund was done after CTY's services as solicitors for the plaintiff was terminated on 14 December 2015. The refund of the stamp duty sum was effected by way of a letter dated 17 June 2016 from LHDN to CTY (p 229, B1).

[41] The sum of RM8,445,561 was credited into CTY's Public Bank Bhd client account No 319681902 on 19 July 2016 (p 5, B3). It is also not in dispute that the MOT and the stamp certificate were used by CTY in applying to LHDN to procure the refund of the stamp duty sum. CTY in fact admits to receiving the refund of the stamp duty sum. CTY did not directly and pointedly inform the plaintiff (through PW1 and/or PW2) that they would be applying to LHDN for a refund of the stamp duty sum.

[42] DW1 said that CTY's letter dated 29 January 2016 (p 113, B1) had already put the plaintiff on notice that CTY would be taking all lawful actions to protect their (CTY's) interests, and this would include applying to LHDN for refund of the stamp duty sum. According to the plaintiff, this discovery was relayed to the directors of the plaintiff, who instructed Messrs Wong & Partners that CTY's conduct/action was without the knowledge, authority and/or consent of the plaintiff. It is alleged that CTY behaved surreptitiously, without the consent of their former client and very pertinently did not disclose in any of the affidavits that were filed in the taxation OS that they had applied for and received the refund of the stamp duty sum. As such, CTY's conduct was construed as most sinister ie fraudulent concealment, breach of trust and a gross dereliction of statutory and fiduciary duties. Thus, Messrs Wong &

Partners issued a letter of demand dated 30 November 2016 (pp 258–259, B1) to CTY (through their solicitors Messrs Chew Biman) for the immediate re-payment of the stamp duty sum.

[43] At this juncture, I should mention that by letter dated 21 July 2016, CTY did send a letter to Fantastic Megaway Sdn Bhd (by registered post to the Pandan Jaya address) that they had received the stamp duty sum of RM8,445,561 and deducted a sum of RM2,368,582.29 and that the balance sum of RM6,076,978.71 will be held in a fixed deposit account pending instructions for the release of the balance sum (pp 231–232, B1).

[44] CTY's letter reads as follows:

> TAKE NOTICE that LHDN had refunded the stamp duty of RM8,445,561 [hereinafter referred to as the refunded sum], which had been received in our client's account today.
>
> We shall forthwith from the refunded sum the outstanding sums due and owing from you to us being our professional charges vide our Notes of Professional Charges to you dated 15 December 2015, including the late payment interest at 8% per annum (*pursuant to Order 5 of the Solicitors Remuneration Order 2005* ['SRO']), the computation whereof are set out below:
>
> ...
>
> ...
>
> TAKE NOTICE that we did not deduct the sums indicated in the Notes of Professional Charges which had not been incurred.
>
> We shall release the balance sum of RM6,076,978.71 (RM8,445,561 less RM2,368,582.29) upon receiving your instructions in due course.
>
> Meanwhile, in order to protect your interest, we shall take immediate step in placing the sum of RM6,076,978.71 into fixed deposit under our clients' account with a bank to earn interests for you. In this regard, TAKE NOTICE that pursuant the provisions of the Legal Profession Act 1976.

[45] But as a matter of fact CTY only took out a sum of RM1,183,549.21 from the stamp duty sum and paid it into their office account. Then came the letter dated 25 July 2016 from Messrs Sunita Osaman & Partners ('SOP') (p 234, B1) addressed to CTY, putting them on notice that they were acting for DW3 and OSW who (according to the letter) 'were and still are, by operation of the law, the directors of M Wealth Corridor Sdn Bhd'. The letter from SOP goes on to state that:

> ...
>
> We are also instructed to give you official NOTICE, which we hereby respectfully do, that you must not release any part of the balance from the refunded stamp duty

(after deducting of your fees and disbursements) whether to *M Wealth Corridor* or *Wong Sin Hua*, *Felix* [WSH] or any of their purported agents or servants as there is no resolution authorizing thereof and that WSH has no *locus standi* to receive the same.

[46] The letter from SOP ends with following paragraph:

...

Finally, we believe you could appreciate, as we hereby respectfully put, that TSOTK and OSW shall hold your esteemed firm liable in the event you release any part of balance of the refunded stamp duty (after deducting of your fees and disbursements) without proper and valid resolution of *M Wealth Corridor* with the approval of TSOKTK and OSW.

WONG & PARTNERS — LETTER OF DEMAND

[47] It is now appropriate to refer to the contents of the letter of demand dated 30 November 2016 by Messrs Wong & Partners to Messrs Chew Biman ('the LOD').

[48] The LOD reads as follows:

Messrs Chew Biman & Co

Advocates & Solicitors

27 Jalan Tualang

Bukit Bandaraya

59100 Kuala Lumpur

Dear Sirs,

Demand for Stamp Duty Refund in the Amount RM8,445,561.00

We act for M Wealth Corridor Sdn Bhd. We are writing to you *in your capacity as solicitors for Chan Tse Yuen & Co in Kuala Lumpur High Court Originating Summons No: WA-24NCVC-874-06/2016*, filed by our client on 2 June 2016 to seek orders for the taxation of your client's Bill for the conduct of a sale and purchase of land transaction ('*Transaction*') and the urgent delivery up of our client's documents ('*Taxation Proceedings*').

In affidavits filed in the Taxation Proceedings, our client had deposed to the fact that our client required the documents for which delivery up was sought, namely the original Memorandum of Transfer and Stamp Duty Certificate ('*Documents*'), to seek a refund of stamp duty paid by our client to the Collector of Stamp Duties in the sum RM8,445,561,00 in respect of the aborted Transaction ('*Stamp Duty*').

It has just come to our client's attention through inquiries made with the Inland Revenue Board, that your client had applied for the refund of Stamp Duty paid on or around 15 February 2016 and had apparently received the refund on or around

17 June 2016. Needless to say, our client was shocked by this revelation as your client appears to have:

(a) applied for the refund of Stamp Duty after their discharge as solicitors for our client;

(b) failed to notify our client of the said application for refund of Stamp Duty and dealings with the Inland Revenue Board; and

(c) failed to remit the Stamp Duty refunded by the Inland Revenue Board to our client.

In fact, *we note that your client has made no mention in any of the affidavits filed to oppose the Taxation Proceedings since 30 June 2016, that your client had already applied for and apparently received the refund of the Stamp Duty Refund, knowing full well that this was materially relevant to our client's prayer for delivery up of the Documents*.

We ask that you remind your client that *the aforesaid conduct may be tantamount to fraudulent concealment, breach of trust and a gross dereliction of your client's continuing statutory and fiduciary duties* as solicitors of M Wealth Corridor Sdn Bhd in the Transaction. We are therefore instructed to *DEMAND, WHICH WE HEREBY DO*, the immediate re-payment of RM8,445,561 to our client and an explanation for the conduct complained of above.

TAKE NOTICE that if your client fails to comply with this demand within *TWENTY FOUR HOURS* of receipt of this letter, we have strict instructions to issue civil proceedings against your client for recovery of the Stamp Duty with all accrued interest for the period of our client's deprivation of the said sum and take all other steps deemed necessary, including the lodgement of both criminal and Bar Council reports against your client.

Yours faithfully,

Wong & Partners

-sgd-

Elaine Yap

Partner.

(Emphasis added.)

[49] Messrs Chew Biman sent a letter in response dated 1 December 2016 and it reads as follows:

Messrs Wong & Partners
Advocates & Solicitors
Level 21, The Gardens South Tower
Mid Valley City, Lingkaran Syed Putra
Kuala Lumpur 59200 Malaysia 1st December 2016

Dear Sirs,

Re: *Demand for Stamp Duty Refund(ed) in the Amount RM8,445,561.00*

We refer to your letter to us dated 30 November 2016 *[your letter]* under reference '*Demand for Stamp Duty Refund in the Amount RM8,445,561.00*.

We are shocked but not amused with your apparent ignorance of the basic law and procedure of legal practice, which was reflected by your own admission that we are (merely) the solicitors for Messrs. Chan Tse Yuen & Co *[CTY & Co]* in respect of Kuala Lumpur High Court Originating Summons No. WA-24NCVC-874-06/2016 *[the OS]*.

Had common sense prevailed, you should know that being the solicitors for CTY & Co in the OS does not mean that we are also the solicitors for them in all matters under the sun.

Note that we had accepted your letter in compliance with the Bar Council Ruling that a firm of solicitors cannot refuse to accept service of any correspondence addressed to them.

In the circumstances, kindly address the matter in your letter to CTY & Co directly. (Emphasis added.)

[50] Since Messrs Chew Biman declined to accept the LOD, Messrs Wong & Partners was compelled to send the LOD directly to CTY. Thus, the LOD and Messrs Chew Biman's response were all sent to CTY under cover of Messrs Wong & Partner's letter dated 1 December 2016 which reads as:

Messrs Chan Tse Yuen & Co

Advocates & Solicitors

43-2-A, Jalan Dwitasik 2

Dataran Dwitasik, Bandar Sri Permaisuri

Cheras, 56000 Kuala Lumpur

Dear Sirs,

Demand for Stamp Duty Refund in the Amount RM8,445,561.00

We attach herewith a copy of our letter dated 30 November 2016 and the response dated 1 December 2016 from your solicitors in the related Taxation Proceedings.

As your solicitors have disavowed any instructions on the above matter, the demands in our letter of 30 November 2016 are hereby directed to you for your immediate response.

Yours faithfully,

Wong & Partners

-sgd-

Elaine Yap

Partner

+603-2298 7838

Encl.

[51] CTY's response was sent via letter dated 8 December 2016 from their solicitors Messrs Tan, Goh & Assoc ('TGA'). I will say no more about the letter from TGA as it does not form part of the record in the present suit. On 19 December 2016, the plaintiff filed the present suit. The reliefs sought by the plaintiff against the defendant in this suit are as follows:

(a) *judgment in the sum RM8,445,561.00;*

(b) a declaration that the Defendant is liable to account to the Plaintiff for the sum RM8,445,561 received by the Defendants from the Collector of Stamp Duties as a refund of duties paid under Stamp Certificate Adjudication No: H01M189545-W025;

(c) a declaration that the Plaintiff is entitled to trace the proceeds of the sum RM8,445,561 received by the Defendants from the Collector of Stamp Duties as a refund of duties paid under Stamp Certificate Adjudication No: H01M18945-W025;

(d) at the Plaintiff's election, all necessary accounts and inquiries and an order that the Defendants pay to the Plaintiff, such amounts determined to be payable upon such accounts and inquiry;

(e) interest on all sums ordered to be paid by the Defendants to the Plaintiff pursuant to section 11 of the Civil Law Act 1956, at such rate or rates as the Court shall think fit, from the date of the order herein till the date of full settlement;

(f) general, *exemplary* and aggravated damages;

(g) costs; and

(h) such relief or other relief as this Honourable Court thinks just and fit. (Emphasis added.)

[52] In the meanwhile, on 15 December 2016, CTY filed a suit for defamation via Kuala Lumpur High Court Suit No WA23NCVC-58–12 of 2016) ('the defamation suit') naming one Elaine Yap (a partner of Messrs Wong & Partners), the firm of Messrs Wong & Partners and the plaintiff here, M Wealth Corridor Sdn Bhd as the first, second and third defendants respectively. The defamation suit was predicated on the publication of the LOD letter to Messrs Chew Biman. Pursuant to an application by all the defendants in that suit, the defamation suit was struck out and dismissed on 12 July 2017. The judgment of this court is reported as: *Chan Tse Yuen & Co v Yap Chin Gaik, Elaine & Ors* [2017] MLJU 1459; [2018] 1 AMR 34; [2017] AMEJ 1467; [2017] 1 LNS 1409. CTY as the plaintiff in the defamation suit has lodged an appeal to the Court of Appeal, which is still pending.

[53] CTY's defamation suit was struck out and dismissed on the grounds that:

(a) the LOD was protected by the defence of absolute privilege (see: *Wong Shui Kee Roger v Victor Chu & Co (a firm)* [2003] 1 HKC 125 and *S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor* [2010] MLJU 2218; [2011] 1 CLJ 460 (CA)); and

(b) the defamation suit was an abuse of process because of the limited publication of the LOD to Messrs Chew Biman, which was a law firm with only one lawyer and even if the claim in defamation succeeded, the quantum of damages would have been meagre and therefore disproportionate to the cost of conducting the defamation suit (see: *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946).

[54] In the present case, the plaintiff alleges that CTY did not make any mention in the taxation OS that in February 2016 that they applied to LHDN for the refund of the stamp duty sum or that in July 2016 the stamp duty sum had been refunded to CTY and/or that they had made deductions towards partial payment of their legal bill and kept the balance in fixed deposit accounts. According to the plaintiff, around 29 November 2016, through inquiries made by Messrs Wong & Partners with LHDN, the plaintiff discovered that CTY had already used the MOT and the stamp duty certificate and applied for and received the refund of the stamp duty sum.

[55] The plaintiff claims that CTY never accounted to the plaintiff for the stamp duty sum. There is no doubt that CTY applied for the refund of the stamp duty sum on or around 15 February 2016 and LHDN paid over the sum to CTY on or around 19 July 2016 (see: letter dated 17 June 2016 from LHDN at pp 229–230, B1). Upon receipt of the stamp duty sum that was refunded, CTY did the following:

(a) *retained the sum RM1,185,262.17 in their office account*;

(b) placed RM1,183,320.12 in a clients account-fixed deposit; and

(c) placed RM6,076,978.71 in another clients' account-fixed deposit.

[56] For completeness, I should add that on 28 July 2017, I had (in these proceedings) granted the following orders under encl 11:

(a) CTY is to place the sum of RM1,185,262.17 in a fixed deposit (client's account) at Public Bank Bhd Bandar Sri Permaisuri Branch within one month from today, that is, on or before 28 August 2017 (by 4pm) and CTY is further directed to file an affidavit of compliance annexing the fixed deposit certificate for the sum of RM1,185,262.17 which is to be filed on or before 29 August 2017;

(b) the status quo of the client's account — fixed deposit for RM1,183,320.12 (Sijil No 894339) and RM6,076,978.71 (Sijil No 894340) as per the CTY's disclosure affidavit (encl 38) is to remain and the fixed deposits are to continue to accrue interest;

(c) the entire stamp duty sum of RM8,445,561, which are in fixed deposit accounts and/or which is to be placed in a fixed deposit account (per para 1 above) is to remain intact and shall not be uplifted or withdrawn or dealt with in any manner whatsoever, without an order of this court;

(d) costs of RM10,000 (subject to 4% allocatur) is allowed as costs in the cause of the suit;

(e) the order granted today is to be served on Public Bank Bhd, Bandar Sri Permaisuri branch by Messrs Wong & Partners; and

(f) the order herein is to be endorsed with the penal notice.

[57] Thus, from about 19 July 2016 until 28 July 2017 (slightly more than a year), CTY had the use and benefit of the entire sum of RM1,185,262.17 and conversely to-date the plaintiff has not had the benefit of the sum of RM8,445,561 or any part thereof. The plaintiff's argument is that the stamp duty sum is clearly monies belonging to the plaintiff or 'client's monies' and CTY being in a (former) solicitor/client relationship, stands in a fiduciary relationship.

[58] Thus, it is alleged that CTY is obliged to account for the stamp duty sum. The plaintiff emphasised the surreptitious and dishonest manner in which CTY went behind the plaintiff's back and applied to LHDN for refund of the stamp duty sum. In so far as the sum of RM1,185,267.17, which was unilaterally 'deducted' by CTY is concerned, CTY argues that they are 'entitled' to that sum as the amount which is payable to them for handling the conveyancing transaction and for disbursements incurred, albeit that the SPA transaction was aborted. CTY justified their entitlement on the basis of the remuneration prescribed by para 2(a) of the Solicitors' Remuneration Order 2005 ('the SRO') read together with First Schedule thereof. CTY also claimed that they under para 2(f) of the SRO were entitled to charge full scale fees as all the work had been done. It may be recalled that one of the reliefs sought in the taxation OS is for the delivery of all the transactional documents under the SPA which includes the MOT and the stamp duty certificate for RM8,445,561. Initially, CTY held on to these documents as they exercised a 'solicitor's lien' over their fees/disbursements. CTY's position may be gleaned from their letter dated 15 December 2015 accompanying the legal bill which reads:

> Further to *your termination of our services as your solicitors in the above transaction on 14 December 2015, we forward herewith our Notes of Professional Charges dated 15 December 2015* for your attention ...

Upon your full settlement of our professional charges/disbursements, *we shall promptly forward all relevant documents in the above transaction at your Malaysian office.*

(p 93 B1) (Emphasis added.)

[59] Thus, the impression that was conveyed was that CTY would hold on to the transactional documents until CTY's bill was settled. There was no intimation in that letter by CTY that they would be making an application to LHDN for the refund of the stamp duty sum and this is exactly what CTY did on 15 February 2016. CTY takes the position that they had already put the plaintiff on notice via letter dated 29 January 2016 (p 113, B1) that they will take all lawful actions to protect their interest. On that premise, CTY asserts that they were justified in applying for the refund as there was a risk that the stamp duty sum would be forfeited by LHDN unless the application for refund was made before 21 September 2016. According to CTY, they applied for the refund to 'protect' their solicitors 'lien' and to protect the plaintiff's interest in respect of the monies, which had been paid to LHDN as stamp duty. Hence, they applied to LHDN and obtained the refund of the stamp duty sum. They received the stamp duty sum and unilaterally made various deductions for the legal fees and disbursements and placed the balance in fixed deposit accounts. Thus, the issue is whether CTY as the plaintiff's former solicitors could, after their services as the conveyancing solicitors vis a vis the SPA had been terminated on 14 December 2015, without the consent of the plaintiff, lawfully apply for the refund of the stamp duty on 15 February 2016, and receive the stamp duty sum and unilaterally make the deductions (of RM1,185,262.17) for their legal fees and disbursements, knowing fully well that the plaintiff was disputing their legal bill via the taxation OS.

[60] In this regard, as I mentioned earlier, by letter dated 21 July 2016, CTY had notified the plaintiff under its former name, Fantastic Megaway Sdn Bhd, at the Pandan Jaya address that they had received the stamp duty sum of RM8,445,561.00, that they had deducted a sum of RM2,368,582.29 and that the balance sum of RM6,076,978.71 will be held in a fixed deposit account pending instructions for the release of the balance sum. In so far as sending the letter to the Pandan Jaya address is concerned, the plaintiff suggests that this is not the usual address of the plaintiff and that it was the business address that was used by the plaintiff's former director, DW3. According to the plaintiff, it was always the practice of CTY to send letters to PW1 and/or PW2 via email. But in this instance, CTY letter dated 21 July 2016 was sent by registered post to the Pandan Jaya address. I will deal with this issue in the later part of this judgment. Notwithstanding what was stated in CTY's letter dated 21 July 2016, as far the evidence is concerned, there is no dispute that CTY:

(a) *retained only the sum RM1,185,262.17 in their 'office account'*;

(b) placed RM1,183,320.12 in a client's account-fixed deposit; and

(c) placed RM6,076,978.71 in another client's account-fixed deposit.

[61] Thus, CTY had taken for themselves a sum of RM1,185,262.17 as part payment of their legal bill dated 15 December 2015. In so far as a solicitor's duty with regard to client's monies are concerned, counsel for the plaintiff referred to the case of *Wan Rohimi bin Wan Daud dan satu lagi lwn Abdullah bin Che Hassan & 270 Yang Lain dan satu lagi rayuan* [2015] MLJU 2190; [2016] 4 CLJ 125 where the Court of Appeal dealt with the issue of a client's right to an account of client's monies, namely a judgment sum which was paid into the solicitors' trust account. In that case, the court held that the defendant stood in a fiduciary relationship of trust and confidence with the plaintiffs, who were their clients. Accordingly, it was submitted that in the present case, CTY were fiduciaries and the refund of the stamp duty sum was received by CTY in their capacity as fiduciaries for the plaintiffs. Counsel for the plaintiff also relied on *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal* [2012] 4 MLJ 72; [2013] 2 CLJ 734, where the Court of Appeal held that an order for an account may be granted against an accounting party who is liable to pay on account. And the categories of accounting parties were identified as follows:

> [23] The accepted traditional categories of fiduciary relationship usually arise in matters involving trustee beneficiary, agent-principal, *solicitor-client*, employee-employer, director-company, and partners' inter se relationships. (Emphasis added.)

[62] Hence, counsel for the plaintiff argued that the stamp duty sum that was received by CTY is client monies belonging to the plaintiff and therefore, trust property in the hands of CTY, who are the former solicitors of the plaintiff.

[63] The only controversy is the fact that CTY claims to be entitled to:

(a) unilaterally deduct RM1,185,262.17 in untaxed fees for the aborted SPA transaction, notwithstanding that CTY's legal bill is being disputed in the taxation OS; and

(b) withhold the difference on instructions from third parties, namely DW3 and OSW, who are ex-directors of the plaintiff (subject to the qualification that DW3 claims that he is still a director and shareholder and OSW claims that he is still a director of the plaintiff as pleaded in Suit 42).

[64] In so far as the evidence is concerned, it is clear that:

(a) CTY did send a letter dated 21 July 2016 to the plaintiff at the Pandan Jaya address by registered post notifying that they had received the stamp duty sum, made deductions for legal fees and disbursements and that they placed the balance in a fixed deposit account; and

(b) CTY further claims that they had transparently mentioned in their affidavit filed in the taxation OS, that they had applied for the refund and made deductions. The paragraph in CTY's affidavit that supposedly alludes to this is para 11 of Mr Chan Tse Yuen's affidavit affirmed on 28 July 2016 (para 11) which reads as:

> (11) Berhubung dengan perenggan-perenggan 10, 11 dan 12, saya sesungguhnya menyatakan bahawa, oleh kerana akhirnya defendan mempunyai lien serta pegangan ke atas bayaran balik duti setem yang berjumlah RM8,445,561 dari Lembaga Hasil Dalam Negeri, yang mana defendan akan memperoleh fi profesionalnya dan membuat pemotongan suatu amaun yang munasabah yang akan dianggarkan sebagai sekuriti untuk kos saman pemula ini, maka defendan gugurkan permintaan sekuriti untuk kos di perenggan (b) dalam lampiran 6.

[65] During the interlocutory stage, CTY sought to justify their action in obtaining the refund of the stamp duty sum and in making the deduction by relying on r 7 of the Solicitors Account Rules 1990, which provides that:

> 7 Drawing money from client account
>
> There may be drawn from client account —
>
> (a) in the case of client's money —
>
> (i) money properly required for a payment to or on behalf of the client;
>
> (ii) in the case of solicitor trust money, money properly required for a payment in the execution of the particular trust;
>
> (iii) money properly required for or towards payment of debt due to the solicitor from the client or in reimbursement of money expended by the solicitor on behalf of the client;
>
> (iv) money drawn on the client's authority; and
>
> (v) money properly required for or towards payment of the solicitor's costs where a Bill of costs or other written intimation of the amount of the costs incurred has been delivered to the client and the client has been notified that money held for him will be applied towards or in satisfaction of such costs;

[66] But during the trial, CTY appears to have abandoned the argument that they were entitled to use client's monies based on r 7 of Solicitors' Account Rules 2005. The emphasis at trial was on ruling 16.01(4) Rules and Rulings of the Bar Council Malaysia and the solicitors' lien which CTY had over the

stamp duty documents. According to CTY, they had not been discharged as the plaintiff's solicitors. And so they were entitled (and had) to apply for the refund so as to protect their lien and to protect the plaintiff's interest as the stamp duty sum would eventually be forfeited by LHDN by sheer effluxion of time.

ISSUES TO BE CONSIDERED AT END OF THE TRIAL

[67] At the end of the trial, I directed parties to consider the following additional issues which I thought had somewhat crystallised the contentions. They are:

(a) did the plaintiff validly terminate CTY's services as the solicitors for the SPA transaction with effect from 14 December 2015?

(b) in view of PW2's email dated 14 December 2015 terminating CTY's services, can CTY take the position that since their fees have not been settled by the plaintiff, they have not been 'discharged' as solicitors for the SPA transaction and/or that they have a lien over the stamp duty sum?

(c) in this regard, can CTY question the plaintiff's locus standi to terminate CTY's services when CTY had responded by issuing a legal bill for services rendered (up to date of termination)?

(d) by issuing the letter dated 15 December 2015 and the legal bill No 03774 dated 15 December 2015 for RM2,411,870 did CTY expressly or implicitly condone or accept that they were validly terminated as solicitors for the SPA transaction?

(e) by issuing the letter dated 29 January 2016, did CTY further signify their implicit acceptance that they had been validly terminated as solicitors for the SPA transaction?

(f) did CTY contemporaneously challenge the termination of their services as the solicitors for the SPA transaction?

(g) did OSW issue the letter dated 3 November 2015?

(h) did OSW send the letter dated 3 November 2015 to PW2 as an attachment to his email to PW2 (p 75 B1) and if he did not, then why not?

(i) was OSW asked at any time by anyone to confirm that the signature on the letter dated 3 November 2015 is his and that the letter was used as the covering letter to hand over the banker's cheque for RM8,445,561 to CTY?

(j) did PW2 ask OSW about the letter dated 3 November 2015, after they became aware of its existence?

(k) if plaintiff had doubts about the genuineness of the letter dated 3 November 2015, why didn't they seek confirmation with OSW or lodge a police report?

(l) assuming the letter dated 3 November 2015 was in fact the covering letter to hand over the banker's cheque to CTY, is it a letter which is 'favourable' to CTY in the sense that it exonerates CTY for their conduct which is being impugned in this suit?

(m) why did CTY send the letter to the plaintiff on 21 July 2016 (pp 231–232 B1) to its address in Pandan Jaya address when all along, letters were emailed as attachments to all the directors including PW1 and/or PW2 (based in Hong Kong)?

(n) what is the legal position or status of a solicitor whose services in a conveyancing transaction has been terminated and can the said solicitor continue to perform any function or do any acts pertaining to the conveyancing transaction including, but not limited to applying for refund of the stamp duty sum?

(o) can CTY rely on cl 4.3 of the SPA to justify their conduct in applying to LHDN for refund of the stamp duty sum?

(p) can CTY rely on the letter dated 3 November 2015 to apply for the refund of the stamp duty sum on 15 February 2016, after they had been terminated as solicitors for the SPA transaction?

(q) what inference (if any), is to be made by the absence of any mention in CTY's letter dated 15 February 2016 (pp 114–115 B1) and CTY's *surat akuan* dated 15 February 2016 (pp 6–7 B2) to the LHDN of the fact that they had been terminated as solicitors for the SPA transaction?

(r) does the evidence show that CTY applied for the refund of stamp duty sum and deducted a sum of RM1,185,262.17 and placed the balance in fixed deposit accounts, in order to protect their lien and to protect the plaintiff's interests? and

(s) does the fact that under s 57 of the Stamp Act 1949, there is a time period within which a refund of the stamp duty sum for an aborted transaction has to be applied for, justify CTY's conduct in applying for refund of stamp duty after their services as solicitors for the SPA transaction had been terminated?

ANALYSIS AND CONCLUSION

[68] It goes without saying that the individual at the epicentre of the dispute here is DW1. Although DW1 has another partner in the firm, it is quite obvious that DW1 is the principal and the directing mind and will of CTY. Indeed, it is also clear that DW1 was solely handling PW1's files at all times.

DW1 has been practising as an advocate and solicitor for about 17 years. There is no doubt that DW1 is very familiar with conveyancing and litigation practice and procedure.

[69] And given the robust submissions that he made in the course of these proceedings, I am certain that he can be a formidable opponent in court. DW1 is a close friend of DW3. DW3 introduced DW1 to PW1 so that DW1 could handle the SPA transaction for the purchase of the Ampang land by the plaintiff. According to DW1 he helped to negotiate the purchase price and managed to convince the vendors to grant an extension of time in order for the plaintiff to pay the earnest deposit. DW1 accepts that PW1 was the person who was the investor for purpose of the purchase of the Ampang land. Indeed, at p 37 NOE (2), DW1 said that although he was dealing with PW1 and DW3, as between them, the person who supplied the funds was PW1 (p 37 NOE (2) lines 1–2). And here the supply of funds was to cover not just the purchase of property but also payment of legal fees. DW1 said that there was a meeting in June 2015 between DW3, DW1 and PW1 wherein it was apparently agreed that the total fee payable for DW1 to handle the SPA transaction would be RM800,000 (inclusive of goods and service tax — GST). To this end, DW1 referred to a bill No 03667 dated 27 July 2015 which was sent to DW3, who forwarded it to PW1 via email. According to DW3 he followed up with PW1 on settlement of the said Bill but this was all verbal or through social media and he has no documentary evidence to substantiate his assertion that he followed up with PW1 on the said bill. In the meanwhile, DW1 was handling *Beyond Hallmark* suit for PW1.

[70] But there was trouble brewing with respect to DW1's handling of the *Beyond Hallmark* suit. It had to do with a security for costs application which was applied for by the defendant in that case. PW1 was not happy with what was going on in the *Beyond Hallmark* suit and he wanted the file transferred to another law firm. In so far as the SPA transaction is concerned, PW1 and PW2 had no issues with DW1's competency or handling of the matter. The termination of CTY's services vis a vis the SPA transaction had nothing to do with CTY's handling of the SPA transaction. I had earlier mentioned the issuance of CTY's first bill dated 27 July 2015 but it was only for purposes of completeness. CTY did not vigorously pursue the said Bill and they issued the second bill dated 15 December 2015 as soon as their services were terminated via PW2's email dated 14 December 2015. Thus, the only relevant bill is CTY's legal bill dated 15 December 2015. Quite apart from the breakdown of the relationship between the plaintiff and CTY, separately (and quite contemporaneously), DW3 also sent a note dated 16 December 2015 to PW1 stating that he had relinquished his directorship and shareholding in, inter alia, the plaintiff (p 104–104, B1). It is quite obvious that apart from the falling out between CTY and the plaintiff, there was also a fall out between DW3 and the

A plaintiff as well. In this regard, on 10 December 2015 (p 89, B1), DW3 had sent a note to CTY stating that he was not to be consulted or approached on any matters concerning the affairs or transaction of the plaintiff and that all queries and instructions should be obtained from PW1.

B **[71]** During cross-examination DW3 said that he had nothing to do with any matters concerning the plaintiff's business transactions and that henceforth CTY was not to approach him for any instructions. But DW3 was adamant that CTY should be paid their fees for work done and disbursements incurred in respect of the SPA transaction. But, DW1 did say during C cross-examination, that DW3 did not instruct CTY to apply to LHDN for refund of the stamp duty sum. However, DW1 said that DW3 was aware of what he was going to do. In fact, DW3 tacitly encouraged DW1 and said 'do whatever you need to do'. DW3's stance is quite understandable. After all, D DW3 and DW1 were close friends, but based on DW3's stand taken as per his letter dated 10 December 2015 (p 89, B1) and 16 December 2015 (pp 104–105, B1), DW3 should not have concerned himself with whether CTY is paid or not and if paid, how much is to be paid. Indeed, the dispute between the plaintiff and CTY over the legal bill dated 15 December 2015, E should likewise be of no concern to DW3. To me, DW3's views as to whether CTY should be paid and if so, how much are quite irrelevant to the dispute in this case. What is at issue here is CTY's conduct in making the application to LHDN via CTY's letter dated 15 February 2016 together with the relevant stamp duty documents and DW1's *surat akuan* affirmed on 15 February 2016, F both of which I will deal with shortly. But it is important to emphasise that the plaintiff describes CTY's conduct in this regard as being surreptitious, lacking in transparency and plainly dishonest.

[72] According to counsel for the plaintiff, CTY was plainly dishonest in G their conduct in constructing a shabby deception to take the plaintiff's monies for themselves. CTY's conduct was described as being in cynical disregard of the plaintiff's right to its property. According to the plaintiff, CTY sent a letter to LHDN together with a *surat akuan* to obtain the refund of the stamp duty sum and both of these were false, misleading and was utterly dishonest. Hence, H counsel for the plaintiff said that if one draws all these threads together, it can lead to only one conclusion as to CTY's conduct — that they were plainly dishonest and they constructed a shabby deception in order to take for themselves the plaintiff's monies.

I **[73]** In this regard, throughout his testimony, DW1 maintained that he acted honestly and transparently and did not hide anything. DW1 said that he should not be punished for doing the plaintiff a favour by ensuring that the stamp duty sum is not forfeited by LHDN. He said that although by PW2's email dated 14 December 2015 CTY's services vis a vis the SPA transaction

were terminated, CTY was not legally 'discharged' as the purchaser's solicitors.

[74] DW1 said that he did what he did because CTY was not discharged and had to protect its lien. DW1 relied on ruling 16.01(4) of the Rules and Ruling of the Bar Council Malaysia which reads as:

> Discharging Solicitors, release of documents and lien over documents.
>
> (a) A Solicitor is entitled to be paid the scale or appropriate fees before he/she is discharged in a conveyancing matter.
>
> (b) Solicitors are entitled to exercise their lien over documents:
>
> (i) until their scale or appropriate fees are paid; or
>
> (ii) until the appropriate undertaking to pay the scale or appropriate fees is received from the new Solicitor.

[75] DW1 maintained that he was in a dilemma as the plaintiff did not communicate with him after 14 December 2015 and his legal bill was unpaid. He said the main shareholder of the plaintiff was a company registered in the British Virgin Island ('BVI'). Hence, he describes the plaintiff as a BVI company. He said there was a real risk that he would not be paid because the plaintiff had no assets in Malaysia. DW1 said that the stamp duty sum which was paid to LHDN was at risk of being forfeited unless an application was made for the monies to be refunded and this must be done within a year of the adjudication of stamp duty. Hence, the stamp duty sum would have been forfeited if there was no application for refund by 21 September 2016. And so, DW1 did what he did in order to 'protect his lien' and to protect the plaintiff's interest. He said he did the plaintiff a 'big favour' and is now being unfairly labelled as dishonest. DW1 also accused Messrs Wong & Partners of not doing their job since they made enquiries with LHDN only in November 2016, which was 'too late'.

[76] But counsel for the plaintiff sought to debunk this by saying that CTY did the plaintiff no favour by going behind their back and applying to LHDN for refund for the stamp duty sum, receiving it from LHDN and in taking a portion of it for themselves, albeit that CTY's legal bill was being taxed in the taxation OS and finally in keeping the balance in fixed deposit accounts (based on DW3's instructions).

[77] Counsel for the plaintiff said that the fact that the plaintiff was seeking delivery of the stamp duty documents via the taxation OS clearly indicated that the plaintiff were intending to make the application to LHDN for refund of the stamp duty sum themselves. But, DW1 adamantly maintained that since CTY's fees/disbursements as per legal bill No 03774 dated 15 December 2015 have not been settled, CTY still remained as the plaintiff's solicitors vis a vis the

SPA transaction. DW1 said that he did inform the plaintiff that he would be taking steps to protect his interest and that this could be found in CTY's letter dated 29 January 2016 (p 113, B1) where CTY said:

> Since the vendor had terminated the SPA on 27.1.2016 and forfeited your deposit sum of RM28.1 millions, we believe you would appreciate that *we shall take ALL lawful actions to protect our interests*. (Emphasis added.)

[78] But, I find that that the above underlined statement in CTY's letter is rather cryptic and is a mere general statement and gave no specific indication whatsoever to the plaintiff that CTY would be applying to LHDN to obtain a refund of the stamp duty sum. In my view, CTY cannot conveniently take refuge in the statement in their letter that 'we shall take all lawful actions to protect our interests' to sanitise and legitimise their action in applying to LHDN for refund of the stamp duty sum, receiving the refund, deducting a portion of the stamp duty sum and finally, in keeping the balance in fixed deposit accounts (as per DW3's instructions).

[79] To put it very bluntly, there was at all times, no authorisation or consent whatsoever by the plaintiff to allow CTY apply to LHDN for refund of the stamp duty sum and/or to receive the refund and/or to deduct a portion of the stamp duty sum. The final aspect of keeping the balance in fixed deposit accounts was admittedly done at the behest of DW3, through SOP's letters to CTY, which counsel for the plaintiff said was part of a nefarious plan that was 'hatched' between DW1 and DW3 to legitimise the retention of the balance of the stamp duty sum. It is not in dispute that CTY's letter dated 15 February 2016 to LHDN (pp 114–115, B1) was not copied to the plaintiff. Thus, the plaintiff was not in the loop of information and was blissfully unaware that CTY had applied to LHDN for refund of the stamp duty sum.

[80] DW1 said he made the application for refund of the stamp duty sum so as to protect CTY's 'lien' and to protect the plaintiff's interest as well. He said that since the SPA had been terminated and deposit forfeited by the vendors, the stamp duty sum had to be refunded and that under proviso (a) to s 57(f) of the Stamp Act 1949, there was a 12 month window period within which to make the application and that if the application is not done and time has expired then, the stamp duty sum will be 'lost'. DW1 also said that LHDN will not refund the stamp duty sum to anyone other than the solicitor who first handled the SPA transaction.

[81] In this regard, DW2 (the officer from LHDN) confirmed that in this case the MOT was dated 22 September 2015 and the application for refund of stamp duty sum must be made before 21 September 2016, failing which the stamp duty sum would be retained by LHDN without any recourse to the plaintiff for an appeal. Hence, DW1 said that it was a matter of urgency that he

had to take steps to obtain the refund. In this regard, it has to be borne in mind that when CTY applied to LHDN on 15 February 2016, CTY's services had already been terminated by the plaintiff. During cross-examination (p 97 NOE (2) line 9) CTY confirmed that from 15 December 2015 onwards, he was no longer representing the plaintiff in the SPA transaction.

[82] But, in CTY's letter dated 15 February 2016 to LHDN and in DW1's *surat akuan* dated 15 February 2016, there was no mention of the fact that CTY had been terminated as the solicitors for the SPA transaction. But DW1 nevertheless maintained that he was honest in his dealings with his representations to LHDN. In this regard, during cross-examination DW1 said that the letter and *surat akuan* dated 15 February 2016 to LHDN were an 'honest expression of what had transpired' (pp 114–115 NOE-2). DW1 said that if he was dishonest he would not have asked LHDN to pay the stamp duty sum into his client's account. During his testimony DW1 said that LHDN would only refund the stamp duty to the solicitor who first handled the SPA transaction (see p 108, line 11 to p 109 line 27, NOE).

[83] But, it is significant that during her testimony in court, DW2 (who was the best person to confirm this position) was not asked by DW1 whether LHDN would entertain a request for refund from a solicitor who was no longer on record for the party which paid the stamp duty sum. Since DW1 took the position during cross-examination that his office was told by LHDN officers that the refund would only be made to the firm which made the payment of the stamp duty, it would have been logical, necessary and imperative that this position be confirmed through DW2. But DW1 did not adduce any such evidence through DW2. During oral clarifications, I asked DW1 why he did not get confirmation from DW2 (when she was in the witness box) and he said 'I forgot to ask her'.

[84] Hence, this should have been established when DW2 was in the witness box. But, CTY did not raise this issue with DW2 when she testified. Had it been clarified in CTY's favour, then there might be a basis to gravitate towards CTY's contention that LHDN will only entertain a request for refund from CTY. Thus, in the absence of any confirmation by DW2 on this point, I have to regard DW1's contention as his mere say-so. Indeed, I rather think that DW1 was not even sure that DW2 would back him up and that is why the question was not put to her. It may, of course be asked, whether the plaintiff should have clarified this through DW2. I do not think that it is the plaintiff's burden because it was DW1 who made the assertion and he should have therefore established it through DW2.

[85] Another point that was raised by CTY was that they were not validly terminated because there is no resolution by the board of directors of the

plaintiff sanctioning the termination of CTY's services as solicitors for all the matters handled by CTY on behalf of the plaintiff. The short answer to this is that, first, CTY themselves had expressly or implicitly accepted by their own letter dated 15 December 2015 that the plaintiff had terminated CTY's services and that is why CTY issued the legal bill No 03774 for RM2,411,336.58 and secondly, when CTY was appointed to act as the plaintiff's solicitors for the SPA transaction, there was no resolution to appoint them as the plaintiff's solicitors. And so, there was no need or necessity for a resolution to terminate CTY's services as the solicitors for the SPA transaction.

[86] Indeed, by virtue of CTY's letter dated 15 December 2015, CTY is estopped from maintaining that they have not been terminated as the plaintiff's solicitors. In any event, in his witness statement (DW1A), DW1 had clearly admitted in his answer to question No 7, that CTY's were terminated. He said, '*we treated it as a termination* of our services'.

[87] I will deal with CTY's letter dated 15 February 2016 to LHDN and the DW1's *surat akuan* dated 15 February 2016 in greater detail in the later part of this judgment. I now propose to deal with the letter dated 3 November 2015, purportedly issued by the plaintiff and signed by OSW which was seemingly the 'covering letter' for the handing over of the MBB bankers cheque for RM8,445,561 to CTY on 3 November 2015 at 10.05am.

[88] CTY relies on this letter as justifying their action in applying to LHDN for a refund of the stamp duty sum, albeit that they had been terminated as the plaintiff's solicitors vis a vis the SPA transaction. The letter dated 3 November 2015 reads as follows:

> Messrs Chan Tse Yuen & Co
>
> Advocates & Solicitors
>
> 43–2-A, JalanDwitasik 2
>
> DataranDwitasik
>
> Bandar Sri Permaisuri
>
> 56000 Cheras, Kuala Lumpur
>
> Dear Sir,
>
> Hartanah: No. Hakmilik Pajakan Negeri (WP) 51541, Lot No. 11979, Mukim Ampang, Daerah Kuala Lumpur, Wilayah Persekutuan
>
> We refer to the Notice of Assessment dated 9 October 2015.
>
> We forward to you our Banker cheque No. MBB 035062 for the sum of RM8,445,561 for payment of the stamp duty assessed by the Inland Revenue Board (IRB).

In the event the acquisition of the land is aborted resulting to the transfer cannot be registered in the land office, your firm is required to obtain the refund of the stamp duty of RM8,445,561 from the IRB into your account and reimburse to us upon your receipt the money from IRB.

Thank you

(Emphasis added.)

[89] The plaintiff placed the letter in Part C of the bundle as they had doubts as to the authenticity of the letter in that it is believed that this letter was an afterthought and was not issued contemporaneously when the banker's cheque was given to CTY. Initially, DW1 relied on the letter to justify CTY's conduct in applying for the refund. Later, DW1 recanted and said (p 97 NOE (2) line 26 that, 'I'm not relying so much on the letter ...'.

[90] He said in law, he had a lien, which he was entitled to protect and preserve. He said, professionally he also had to protect the interest of the client. And with these 'two good reasons' (p 98 NOE (2)), CTY applied for the refund. It was established during the trial that the letter dated 3 November 2015 was acknowledged by one May Siew, a staff of CTY. She sat in court during the trial but did not testify (see NOE (2) p 43 line 1–20). According to the plaintiff, they did not issue this letter. They also did not check with OSW whether this was a genuine letter but PW1 and PW2 confirmed that the signature on the letter 'appears' to be OSW's signature. The plaintiff did not lodge a police report specifically with regard to the letter dated 3 November 2015.

[91] According to the plaintiff, the letter dated 3 November 2015 was created later in order to give an excuse for CTY to apply for the refund of the stamp duty sum from LHDN. DW1 denied the allegation. And in this regard, CTY took the position that in applying to LHDN for a refund of the stamp duty sum, they were merely acting in accordance with the client's instructions as per the letter dated 3 November 2015. According to the plaintiff, they only had sight of this letter when CTY filed affidavits in the course of interlocutory applications that were filed in these proceedings and in the defamation suit.

[92] In this regard, counsel for the plaintiff emphasised that the only person who could testify as regards the veracity or authenticity of the letter dated 3 November 2015 was the maker namely OSW, who was initially supposed to be a witness for CTY. His name appeared in CTY's list of witnesses.

[93] However, OSW did not testify during the trial. DW1 and DW3 did not explain why OSW did not appear as a witness at the trial. DW1 merely said that OSW was not available. Eventually DW1 said that OSW was not relevant.

A Finally, he said that it was the plaintiff's burden to call OSW. According to DW1, the burden is on the plaintiff to call OSW as a witness because it is a letter issued by the plaintiff. I disagree. In my view, it is CTY who should have called OSW to testify as to the genesis of the letter dated 3 November 2015. It may be noted that OSW was on CTY's witness list.

B

[94] CTY did not ask him to attend court although they knew that the letter dated 3 November 2015 (ID-D1) was in Part C and was being challenged by the plaintiff in terms of its authenticity. In this regard, it was only through DW3's witness statement (DW3A) that it was revealed that he (DW3) had drafted the purported letter dated 3 November 2015.

C

[95] During his testimony DW3 said that he was overseas when the bankers cheque was delivered to CTY's office. DW3's office was in Pandan Jaya Kuala Lumpur whereas CTY's office was in Bandar Permaisuri, also in Kuala Lumpur. He said that he checked via phone call and found out that the banker's cheque for RM8,445,561 had been delivered by his office to CTY's office, without a covering letter. He said that it is his practice to ensure that there is a covering letter for anything that is delivered to another party.

D

E

[96] As such, he drafted the letter and sent it via social media to OSW in order that OSW could print it out, sign it and have it delivered to CTY's office. In this regard, on the face of it, the letter appears to have been 'received' by CTY's staff, May Siew at 10.20am on 3 November 2015. It was suggested that it is impossible for the banker's cheque to have been delivered first and then for the letter to have been sent by DW3 to OSW and for the latter to print, sign and deliver it by 10.20am to CTY's office because of the sheer distance between DW3's office in Pandan Jaya and CTY's office in Bandar Permaisuri. DW3 disagreed.

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[97] He said that it was possible. In my view, whether it was possible or not for the letter to be delivered to CTY's office by 10.20am is not that critical, and what is really important is that DW3's narrative as to the circumstances giving rise to the creation and delivery of the letter dated 3 November 2015 can only be verified by OSW, who was conspicuously missing from the witness box. I note that before he signed his witness statement (DW3A), DW3 made an amendment and handwrote the following words after his answer to question A9 'The letter was drafted by me and was sent to Ong Shu Wei via social media for printing'. I found this to be quite odd. Obviously the letter was CTY's saviour (or at least CTY thought so) in terms of their conduct in seeking a refund from LHDN after the SPA transaction was aborted. Yet in DW3's witness statement, the fact that it was created by DW3 only came about at the very last minute whilst DW3 was in the witness box before the witness statement could be signed and marked as DW3A.

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I

[98] Naturally, counsel for the plaintiff suggested that this was an 'afterthought' on DW3's part. As I said, I found this to be odd. It should have been in the witness statement in its original version and its inclusion in handwritten form at the last minute does not inspire any confidence as to the credibility of the assertion that DW3 was the creator of the letter in the manner as he had suggested in his amendment to his witness statement. Having said that I accept that last minute amendments may sometimes be necessary to a witness statement but those are usually for typographical or other errors.

[99] Here, DW3 had included an important narrative in his witness statement by a handwritten note which was done just before he signed the witness statement. Bearing in mind that DW3 and DW1 are close friends and DW3 was of the view that DW1 must be paid for the legal services which he had rendered to the plaintiff and given the underlying animosity between DW3 and PW1, it is more probable than not that DW3 may have taken it upon himself to come up with an explanation in order to 'assist' or 'exculpate' his friend, DW1. The circumstances here are such that the suggestion by plaintiff's counsel that this was an 'after-thought' is not so far-fetched after all. As for the burden, it is plain that since CTY was relying on the letter dated 3 November 2015, it is they who bear the burden under s 103 of the Evidence Act 1950. Section 103 of the Evidence Act 1950 reads as:

> *103 Burden of proof as to particular fact*
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ILLUSTRATIONS
>
> (a) *A* prosecutes *B* for theft and wishes the court to believe that *B* admitted the theft to *C*. *A* must prove the admission.
>
> (b) *B* wishes the court to believe that at the time in question he was elsewhere. He must prove it.

[100] Thus, since CTY failed to call OSW as a witness and having offered no explanation for his absence, I am compelled to the view that CTY has not discharged their burden under s 103 of the Evidence Act 1950. In this regard, CTY could possibly have but, did not lay the foundation for the letter to be admitted via s 73A of the Evidence Act 1950 as an exception to the general rule against documentary hearsay. Section 73A of the Evidence Act 1950 reads as:

> 73A Admissibility of documentary evidence in civil cases, etc.
>
> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the

A original document, be admissible as evidence of that fact if the following conditions are satisfied:

(a) if the maker of the statement either —

(i) had personal knowledge of the matters dealt with by the statement; or

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(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

C

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

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E **[101]** Finally, it is rather telling that after payment was made to CTY's office on 3 November 2015, OSW sent an email to PW2 enclosing all the relevant documents (pp 76–87, B1) for the latter's record and the letter dated 3 November 2015 was not attached to the email. When asked about this, DW1 said that he cannot answer for OSW. This clearly bolsters the point made by counsel for the plaintiff that OSW should have been called as a witness to explain about the letter dated 3 November 2015. OSW would also have to explain why this letter was not included as an attachment to his email to PW2. Lastly, during closing oral submissions, DW1 appeared not to be relying on the letter dated 3 November 2015. Rather, he preferred to justify his actions on the need to 'preserve' and 'protect' his solicitor's lien. I will deal with solicitor's lien in due course. For now, for the reasons as stated above, I hold that the letter dated 3 November 2015 has not been proven for purposes of it being admitted as an exhibit. During the trial, the document was marked as ID-D1. As such, I decline to convert it into an exhibit. In this regard, I have followed the principle that was enunciated by Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 183 where he opined that documents which are not marked as exhibits must be excluded from the evidence for purposes of the trial. The relevant passage from the judgment of Abdoolcader J read as:

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I It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, ...

...

As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto.

[102] I have accordingly decided not to take this document into account. In any event, as rightly submitted by counsel or the plaintiff, even if the letter is to be accepted as a genuine document, which was issued contemporaneous with the delivery of the banker's draft to CTY on 3 November 2015, it still does not exculpate CTY for their conduct in utilising the relevant documents over which they had a lien by applying to LHDN for refund of the stamp duty sum when they were already terminated as solicitors for the plaintiff. The point here is that any purported prior instructions that were given to CTY as the plaintiff's solicitors at the material time does not remain extant once the solicitors' services had been terminated. This is plain logic. A close analogy would be the dismissal of an employee. Once an employee is dismissed by the employer, he cannot continue to assert the status of employee and do things or carry out acts or conduct himself as an employee of the former employer. The relationship of employer/employee is severed and can only be resurrected by consent of the parties or by an award of the Industrial Court pursuant to an award of reinstatement under s 20 of the Industrial Relations Act 1967.

[103] Here it is plainly unarguable that CTY was terminated and discharged as the solicitors for the plaintiff in the SPA transaction and they had no authority to represent the plaintiff and purport to hold themselves out as solicitors for the plaintiff in their communication with, inter alia, LHDN.

[104] Moving on to some other issues, counsel for the plaintiff referred to s 114(g) of the Evidence Act 1950 and urged the court to draw an adverse inference against CTY for their failure to call OSW and/or Siew May (staff of CTY) as witnesses in these proceedings. Section 114(g) of the Evidence Act 1950 reads as follows:

114 Court may presume existence of certain fact

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume —

...

...

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[105] There was no explanation for the absence of OSW and/or Siew May from the witness box in circumstances where it was crucial for both of them to have testified on, inter alia, the authenticity of ID-D1. As I said, Siew May sat in court on the first day of trial and could have very easily been called as a witness.

[106] As for OSW, only DW1 and/or DW3 know the real reason why he did not come to court, especially since he appears to be the author of ID-D1. Obviously he has much to answer in relation to the genesis and authenticity of ID-D1. In the peculiar circumstances of this case, I have no hesitation in drawing an adverse inference against CTY for the non-production of OSW and/or Siew May as witnesses in this trial.

CTY'S (DW1'S) TRANSPARENCY/HONESTY

[107] I turn now to the topic of CTY's (DW1's) purported transparency and honesty. DW1 agreed that he knew of PW1's address in Hong Kong and that PW1 was the person behind the 'funding' for the purchase of the Ampang land by the plaintiff. But, for his part, DW3 refused to accept that PW1 was the person who was funding the SPA transaction. DW3 said PW1 was the representative for a group of investors from mainland China. At any rate, DW3 accepted that PW1 was the authorised representative for the investors from China. But, as far as DW1 is concerned, he agreed that PW1 must be consulted and be in the loop of all matters pertaining to the purchase of the Ampang land. Indeed, I have not seen any contemporaneous documentary evidence independently emanating from DW3 by way of instructions to DW1 on matters concerning the SPA transaction. In this regard, DW1 also agreed that all along he or his office had liaised with PW1 directly via email or indirectly through DW3 who would forward DW1's/CTY's email to PW1 who was based in Hong Kong.

[108] And after PW2 joined the plaintiff and became PW1's personal assistant around early September 2015, all correspondence of and concerning the plaintiff or the purchase of the Ampang land was directed to PW2 and at times, copied to PW1 as well. Clearly, CTY knew that PW1 and/or PW2 were micromanaging the conveyancing deal from Hong Kong. PW1 is not conversant in English and PW2 would translate and explain the content of the email or any attachments thereto, to PW1. The important point here is that DW1 admitted that all correspondence to the plaintiff, even by way of letters etc, would be emailed to either PW1 and/or PW2. The significance here is that DW1's letter dated 21 July 2016 (pp 231–232, B1)to the plaintiff (by which CTY had purported to notify the plaintiff of the stamp duty refund) at the 'Pandan Jaya' address was sent via registered post and received by one 'Sapina' who, DW3 confirmed is Sapina Saad, his personal assistant. The said letter is

important as it reveals that CTY had obtained a refund of the stamp duty sum and they had proceeded to deduct a sum of RM1,183,549.21 and placed the balance in fixed deposits pending further instructions. DW1 could not give a credible or valid explanation as to why this all important letter was not emailed to PW1 or PW2 as was done for other letters in the past. He said it was the business address of the plaintiff. But this is at odds with the established practice of CTY all along in sending letters and documents via email to PW1 and PW2. DW1 said that PW1 ignored his requests for payment of CTY's legal bill and PW1 did not want to have any contact or communication with him and so he felt it was pointless sending the letter to PW1 via email.

[109] DW1 said that there is nothing wrong in sending the letter dated 21 July 2016 to the Pandan Jaya address and that it was the business address of the plaintiff. In this regard, whilst it is true that the Pandan Jaya address was the official business address of the plaintiff, the said address was also the business address of DW3. DW1 was fully aware that neither PW1 or PW2 had any physical presence at the Pandan Jaya address. Neither DW3 nor Sapina Saad (who did not testify at the trial) took the trouble to email the CTY letter dated 21 July 2016 to PW1 or PW2 so as to apprise them of what CTY had done in respect of the stamp duty sum. During cross examination, DW3 said rather astonishingly, that he had not seen the CTY letter dated 21 July 2016 which was addressed to the plaintiff. But DW3 was not able to explain how his solicitors, SOP became privy to CTY's letter dated 21 July 2016 as is self-evident from the contents of their letters dated 25 July 2016 and 28 July 2016 to CTY (pp 234–235, B1) respectively wherein they said their client (DW3 and OSW) were contemplating intervening in the taxation OS. In their letter dated 25 July 2016, SOP warned CTY not to release the balance of the stamp duty sum to the plaintiff as DW3 and OSW are still lawful directors of the plaintiff. Eventually, DW3 agreed that SOP would have spoken to CTY and got all the information and that was how his solicitors became aware of the taxation OS.

[110] During cross-examination, it was put to DW3 that the letters from SOP were 'hatched' between DW3 and DW1 so as to justify CTY deducting the sum of RM1,183,549.21 and withholding the balance (which was placed in fixed deposit accounts). DW3 denied that that was the case. DW3 said that as far as he was concerned, CTY should be paid for their services. As for the retention of the balance by CTY (in fixed deposit accounts) DW3 said that there was a legal suit (Suit 42) in respect of his directorship and shareholding and so the balance was rightly kept in fixed deposit accounts pending the outcome of the suit.

[111] In so far as the plaintiff is concerned, they said that they only came to know of the existence of CTY's letter dated 21 July 2016, when it was annexed

as an exhibit to CTY's affidavit filed in the interlocutory proceedings in this suit and in the defamation suit. In so far as the letter dated 3 November 2015 is concerned, I noted that DW1's witness statement (DW1A) is silent on the matter, as no reference was made to this letter. However, DW1 said during cross-examination that he was merely following the instructions as per the letter dated 3 November 2015 in making the application to LHDN for the refund of the stamp duty sum via CTY's letter dated 15 February 2016 which was admittedly not copied to the plaintiff or to PW1 or PW2. DW1 said there was no necessity to copy CTY's letter dated 15 February 2016 to the plaintiff. DW1 said that he went ahead and made the application for the refund because:

(a) CTY had not been discharged as solicitors for the SPA transaction;

(b) CTY had to protect its 'lien';

(c) CTY wanted to protect the plaintiff's interests; and

(d) there was a time-frame within which the refund had to be sought (per proviso (a) s 57(f) of the Stamp Act 1949).

CTY'S LETTER TO LHDN

[112] I turn now to CTY's letter to LHDN dated 15 February 2016 (pp 114–115, B1) which reads:

Lembaga Hasil Dalam Negeri
(Cawangan Cheras)
Tingkat 9-12, Menara PGRM
8, Jalan Pudu Ulu
56100 Kuala Lumpur 15hb Februari 2016

Tuan,

Per: Permohonan Bayaran Balik Duti Setem

Hartanah: No. Hakmilik Pajakan Negeri (WP) 51541, Lot No. 11979, Mukim Ampang, Daerah Kuala Lumpur, Wilayah Persekutuan

[selanjutnya sebagai '*Hartanah tersebut*']

Penjual: *BJ Properties Sdn Bhd*

Pembeli: *Fantastic Megawau Sdn Bhd*

No. Adjudikasi: *HM01M189545-W025*

Tarikh pembatakan transaksi: 19.1.2016

Dengan hormatnya kami merujuk kepada perkara tersebut di atas.

Kami bentangkan kronologi transaksi pembelian hartanah oleh pembeli sehingga pembatalannya, seperti berikut:-

(1) Perjanjian jual beli telahpun disempurna dan disetemkan pada 30 July 2015 oleh kedua-dua penjual dan pembeli terhadap pembelian Hartanah tersebut (*sesalinan Perjanjian Jual Beli bertarikh 30 July 2015 ['S & P'] kini dilampirkan di sini dan ditandakan sebagai Ekshibit 'A'*);

(2) Pembelian Hartanah tersebut adalah tertakluk kepada kebenaran bertulis daripada pihak berkuasa Pejabat Tanah dan Galian Wilayah Persekutuan ['PTGWP'] dan surat kebenaran pindahmilik telah diterima oleh firma kami selaku peguamcara pembeli menurut klausa 2 S&P pada 21.9.2015;

(3) Tarikh penyelesaian transaksi belian adalah pada 20 December 2015 dan tarikh lanjutan selama 30 hari pula tamat pada 19.1.2016, menurut klausa 3 S&P;

(4) Borang pindahmilik 14A ('Borang 14A') telah diserahkan untuk taksiran setem duti di pejabat LHDN, Cawangan Cheras, pada 22.9.2015 melalui e-filing dan taksiran setem duti telah dibayar pada 3 November 2015 oleh firma kami menurut Notis Taksiran setem duti bertarikh 9 October 2015 (*sesalinan Notis Taksiran dan Sijil Setem bertarikh 3 November 2015 kini dilampirkan di sini dan ditandakan sebagai Ekshibit 'B'*);

(5) Pembeli telah gagal dan mungkir untuk memenuhi kewajipannya dalam S&P. Oleh itu penjual telah menamatkan transaksi jual beli Hartanah tersebut melalui surat peguamcaranya, Tetuan Amir, Lim & Partners bertarikh 27.1.2016 (*sesalinan surat Tetuan Amir, Lim & Partners kini dilampirkan dan ditandakan sebagai Ekshibit 'C'*);

(6) Tanggal 3 November 2015, Pembeli melalui suratnya kepada kami telah menyatakan bahawa sekiranya transaksi belian dibatalkan kami perlu mendapatkan bayaran balik duti setem bagi pihaknya (*sesalinan surat bertarikh 3 November 2015 kini dilampirkan di sini dan ditandakan sebagai Ekshibit 'D'*).

Justeru, kami memohon bayaran balik duti setem bayar kepada pihak kami selaku peguamcara pembeli menurut S&P. Kami juga kepilkan di sini sesalinan Surat Akuan Berkanun Bayaran Balik duti setem yang diikrarkan oleh peguam kami, En Chan TSe Yuen pada 15.2.2016.

Kami bentangkan di sini butiran bank firma kami untuk tindakan tuan yang selanjutnya.

Nama Firma : CHAN TSE YUEN & CO — CLIENT'S ACCOUNT

Nama Bank : Public Bank Berhad (Bandar Sri Permaisuri branch)

Nombor Akaun: 3180169921

Swift Code : PBBEMYKL

Sekian. Terima kasih.

(p 114–115, B1) (Emphasis added.)

[113] Strangely, CTY asserts in the above letter that they are the 'peguamcara

pembeli menurut S&P'. But, factually that is misleading as CTY's services were terminated as of 14 December 2015.

CTY'S SURAT AKUAN TO LHDN

[114] Next, I refer to DW1's *surat akuan* dated 15 February 2016 which reads as:

1. Saya ialah seorang Peguambela dan Peguamcara di Mahkamah Tinggi Malaya dan mengamal di Kuala Lumpur di bawah nama dan stail Tetuan Chan Tse Yuen & Co yang beralamat di No. 43-2-A, Jalan Dwitasik 2, Dataran Dwitasik, Bandar Sri Permaisuri, 56000 Cheras, Kuala Lumpur ('CTY & Co').

2. Pada 21.9.2015, CTY & Co telah menerima surat bertarikh 21.9.2015 daripada peguamcara penjual, yakni Tetuan Amir Lim & Partners ['ALP'] telah menyerahkan salinan asal surat kebenaran pindahmilik dengan diisukan oleh Pejabat Tanah dan Galian Wilayah Persekutuan Kuala Lumpur dan salinan asal surat tebusan pinjaman yang diisukan oleh RHB Bank Bhd bertarikh 15.9.2015 untuk tindakan pembeli. Sesalinan surat kami bertarikh 22.9.2015 dialamatkan kepada Pembeli, kini dilampirkan di sini dan ditandakan sebagai Lampiran 'A'.

3. Pada 22.6.2015, atas arahan M-Wealth Property Development Sdn Bhd (yang merupakan syarikat subsidiari Pembeli), CTY & Co telah mengeluarkan surat tawaran bertarikh 22.6.2015 kepada BJ Properties Sdn Bhd, (Penjual) untuk membeli sebidang tanah yang dikenali sebagai No. Hakmilik Pajakan Negeri (WP) 51541, Lot No. 11979, Mukim Ampang, Daerah Kuala Lumpur, Wilayah Persekutuan (hartanah tersebut).

4. Pada 22.9.2015, CTY & Co telah menulis dan mengesahkan dengan ALP, tarikh permulaan dan tarikh matang transaksi pembelian hartanah tersebut termasuk lanjutan masa tarikh matang.

5. Pada 12 October 2015, CTY & Co telah menulis kepada Pembeli dan memaklumkan bahawa taksiran setem duti yang telah ditaksirkan adalah sebanyak RM8,445,561 dan perlu dibayar pada atau sebelum 2 November 2015. Sesalinan surat bertarikh 12 October 2015 dialamatkan kepada Pembeli, kini dilampirkan di sini dan ditandakan sebagai Lampiran 'B'.

6. Pada 3 November 2015, Pembeli melalui suratnya kepada kami telah menyatakan bahawa sekiranya transaksi belian dibatalkan, kami perlu mendapatkan bayaran balik duti setem bagi pihaknya. *Sila rujuk kepada Ekshibit D dalam surat kami bertarikh 15.2.2016.*

7. Pada 19 November 2015, CTY & Co telah mengeluarkan surat bertarikh 19 November 2015 kepada Pembeli memaklumkan kepadanya, antara lain, untuk membuat tebusan keseluruhan gadaian yang diberikan oleh RHB Bank Bhd kepada Penjual yang berjumlah RM73,625,709.12 pada

atau sebelum 9 December 2015. Sesalinan surat bertarikh 19 November 2015 dialamatkan kepada Pembeli, kini dilampirkan di sini dan ditandakan sebagai Lampiran 'C'.

8. Pada 1 December 2015, CTY & Co telah menerima surat daripada ALP yang mengatakan bahawa tarikh matang transaksi pembelian adalah pada 20 December 2015 dan tarikh matang lanjutan adalah pada 19.l.2016 tertakluk kepada pembayaran faedah sebanyak 8% setahun. Sesalinan surat ALP kini dilampirkan di sini dan ditandakan sebagai Lampiran 'D'.

9. Pada 8 December 2015, CTY & Co telah menulis kepada Pembeli untuk membuat pengesahan samada tebusan gadaian telah dilakukan ke atas RHB Bank Bhd. Sesalinan surat bertarikh 8 December 2015 dialamatkan kepada Pembeli, kini dilampirkan di sini dan ditandakan sebagai Lampiran 'E'.

10. Pada 14 December 2015, CTY & Co telah menerima surat daripada ALP antara lain yang menyatakan bahawa perlanjutan masa tarikh matang transaksi selama 30 hari diberikan tertakluk kepada pembeli mendepositkan pembayaran faedah sebanyak 8% setahun atas jumlah harga baki belian pada atau sebelum 20 December 2015. Sesalinan surat ALP kini dilampirkan di sini dan ditandakan sebagai Lampiran 'F'.

11. Pada 27.1.2016, CTY & Co telah menerima surat daripada ALP, antara lain, yang menyatakan bahawa penjual telah membatal/menamatkan transaksi penjualan/pembelian hartanah tersebut kerana kegagalan pembeli untuk menyelesakan (*sic*) keseluruhan baki harga belian 20.1.2016 dan deposit yang telah dibayar telah disita (forfeit). *Sila rujuk kepada Ekshibit C dalam surat kami bertarikh 15.2.2016*.

Seperkara lagi, pembeli masih berhutang dengan kami, keseluruhan fi transaksi pembelian hartanah tersebut walaupun telah berkali-kali diminta untuk melangsaikannya. Namun demikian, pembeli masih gagal, abai dan enggan untuk menyelesaikan fi kami. Kami mempunyai lien ke atas segala dokumen bagi transaksi pembelian ini.

Oleh yang demikian, kami memohon agar wang bayaran duti setem dipulangkan kepada firma kami. Chan Tse Yuen & Co dan setelah menolak fi kami, baki bayaran duti akan dikembalikan kepada pembeli.

Dan saya membuat akuan ini dengan penuh kepercayaan bahawa ianya adalah benar serta menurut dan mematuhi peruntukkan-peruntukkan Akta Akuan Berkanun 1960.

Diikrarkan oleh Chan Tse Yuen

Di Kuala Lumpur

Pada 15hb Februari 2016.

(p 6, B1)

[115] It is important to note that in CTY's letter dated 15 February 2016 to

LHDN and the *surat akuan*, there was no mention that CTY's services as the solicitors for the plaintiff had been terminated as of 14 December 2015. Indeed, by the letter dated 15 February 2016 and the *surat akuan*, CTY gave the impression to LHDN they were still acting for the plaintiff. Thus, the application for a refund of the stamp duty sum. As I mentioned earlier, although DW1 said that LHDN would only deal with CTY as their name appears on the documents as the solicitors for the purchaser, it was not established through DW2 that LHDN would not entertain an application from any other solicitor and that they would entertain an application for refund of the stamp duty only if it was made by CTY. But the question is whether LHDN would have entertained CTY's application had they been told that CTY was no longer the purchaser's solicitor with effect from 14 December 2015. Obviously, it was important to establish through DW2 that LHDN would entertain a request for refund only if it was made by CTY and by no other solicitor.

[116] When I asked DW1 about this during oral clarification, he said that he forgot to ask DW2 about this. I rather think that DW1 did not put this issue to DW2 as she may have blown a big hole in his theory that LHDN will only refund the stamp duty to the solicitor through whom the payment of the stamp duty was made.

[117] I turn now to DW3's role. For reasons which were not made clear and which are in any event irrelevant, there was a falling out between DW3 and PW1 which resulted in DW3 sending the following email on 10 December 2015 to CTY (p 89, B1). It reads as follows:

> Dear Mr Chan,
>
> It has been brought to my attention that the recent exchange of words, if not trading tirade, has indeed been disturbing and ugly.
>
> May I remind your goodself once again that all matters pertaining to the legal cases and agreement handled by you for Mr. Felix Wong, i.e.: the purchase of land from BJ Properties by M-Wealth Corridor Sdn. Bhd. and the civil suit against Megat Najmuddin & Leong by Beyond Hallmark Sdn. Bhd., are to be directed and addressed to Mr. Felix Wong and/or his designated personnel in his Hong Kong office.
>
> Both Frankie Ong and I have no jurisdiction or authority in making any decision for Mr. Felix Wong who is the sole investor in both companies mentioned above. Neither do we need to play such messenger role as forwarding all you mails with explanation to Mr. Wong who has expressed his chagrin over the matter to us.
>
> As regards to the termination of your service in handling the aforementioned cases, the decision is his. As to how you are going to handover, or otherwise, the cases to his newly appointed lawyer, the decision is yours, I have no right to whatsoever in influencing your decision though I have been repeatedly reminded of the fact that

I was the introducer recommending you to Mr. Felix Wong. Such logic to me is utterly ludicrous and unprofessional.

On the controversy of legal charges raised by Mr. Felix Wong, you may clarify to him directly as all financial matters including monetary remittance are to be handled by his Hong Kong office. In my record, I have never made any payment amounting to RM600,000 to you as alleged by his Hong Kong staff.

I see no reason why my credibility and integrity deserve this kind of unfounded misgiving. Therefore, may I suggest that all your invoices and record of past payments be directed to Mr. Felix Wong instead of addressing to me and Frankie so as to avert any unnecessary suspicion and controversy.

(p 89, B1)

[118] DW3's email dated 10 December 2015 to CTY should be read in conjunction with DW3's letter to PW1 dated 16 December 2015 (p 104, B1) which reads as:

Mr. Felix Wong Sin Hua 16th December 2015

c/o Good Hope Energy Group Ltd.

Room 1506, 15/F, ICBC Tower,

3, Garden Road, Central,

Hong Kong

Dear sir,

Re: *RESIGNATION OF ONG TEE KEAT AND MATTERS RELATED TO MALAYSIAN COMPANIES INOVLVING THE INTEREST OF MR. FELIX WONG SIN HUA*

Pursuant to my text message sent to you via What's App on 15-12-2015, I hereby officially resign with immediate effect from all the director posts in the following companies that were incorporated under your directive at different time:

(1) Beyond Hallmark Sdn. Bhd.,

(2) Pahlawan Ulung Sdn. Bhd.,

(3) M-Wealth Property Development Sdn. Bhd.,

(4) M-Wealth Capital Sdn. Bhd.,

(5) M-Wealth Corridor Sdn. Bhd.

As regards to the shares of companies (No. 2,3,4 & 5) held in my name, as I had pre-signed the share transfer forms, you can thus execute the share transfer with immediate effect without any difficulties. While as one of the signatories of bank accounts for companies (3), (4) and (5), I would hereby seek the immediate action of the company secretary, namely MKI Corporate Consultants (M) Sdn. Bhd. to do the needful in terminating my role as the bank account signatory.

> Also, all the above-mentioned companies are hereby advised to cease their operation in the present premises at No. 15C, Jalan Pandan 3/5, Pandan Jaya, 55100 Kuala Lumpur, latest by end of December, 2015. Your attention and action is sought with appreciation.
>
> (p 104, B1)

[119] I turn now to the accuracy of CTY's affidavit filed on the taxation OS, which was the affidavit which purportedly disclosed to the court that CTY had applied for and obtained the refund of the stamp duty sum. In that affidavit which was filed in relation to CTY's application for security for costs against the plaintiff and which was later withdrawn, CTY asserts (in Bahasa Malaysia) that:

> (11) Berhubung dengan perenggan-perenggan 10, 11 dan 12, saya sesungguhnya menyatakan bahawa, oleh kerana akhirnya defendan mempunyai *lien* serta pegangan ke atas bayaran balik duti setem yang berjumlah RM8,445,561 dari Lembaga Hasil Dalam Negeri, yang mana defendan akan memperoleh fi profesionalnya dan membuat pemotongan suatu amaun yang munasabah yang akan dianggarkan sebagai sekuriti untuk kos saman pemula ini, maka defendan gugurkan permintaan sekuriti untuk kos di perenggan (b) dalam lampiran 6.

[120] In CTY's affidavit affirmed on 28 March 2017 (filed in Suit 58), it was alleged by CTY that the relevant disclosure had been made by CTY in the taxation OS and it was cynically stated that:

> *It appears that D3 did NOT understand the above paragraph which confirmed that CTY & Co was in possession and/or control of the refunded stamp duty of RM8,445,561/- and could eventually deduct the outstanding professional fees (and disbursements) as it has lien over the refunded stamp duty; hence the plaintiff dropped the prayer or security for costs against D3* (i.e. *the plaintiff in OS 874*).
>
> (b) The plaintiff received the refunded stamp duty of RM8,445,561/- into its account on 21 July 2016; and promptly informed D3 in its letter dated 21 July 2016 vide A.R. Registered Post No. RA 215393352 MY (*also vide Certificate of Posting*); the A.R. Card returned showed that the letter was received on 25 July 2016.
>
> (p 317, B1) (Emphasis added.)

[121] But during the trial, DW1 rather belatedly and conveniently distanced himself from the accuracy of CTY's affidavit and said that CTY's affidavit was not properly translated into Bahasa Malaysia. Hence, DW1 implicitly accepts that CTY's affidavit which was filed in the taxation OS did not convey the true picture to the court and to the parties.

[122] I turn now to DW1's witness statement (DW1A) which was the second version of his witness statement. In the first version (encl 127) which was filed in court, the narrative was different. Indeed in encl 127, DW1 had

stated that:

... On 14 December 2015 upon received (sic) of the email from Ellen Huang (see p 92 CBD) [marked as Exhibit ...] which purportedly terminated our services, I pressed TSOTK for our fee and I told him that upon termination of services we were entitled to furnish the plaintiff the Full Scale fee and take all lawful actions including to apply for refund of the stamp duty so as to protect our lien and interest. TSOTK said we were entitled to do whatever deemed necessary for our fees, as we had indeed rendered professional services for the plaintiff in the transaction.

Q17. *What happened to the stamp duty*?

A17. On 15.2.2016, we had applied for the refund of the stamp duty from LHDN.

Q18. *What was the legal basis you had hold on the documents pertaining to the transaction and apply for refund of the stamp duty?*

A18. The Full Scale Fee was calculated based on the scale prescribed under the Legal Profession Act 1976, sub-Rule 16.01 (4) of the Rules and Rulings of the Bar Council Malaysia, provides, inter alia, that:

Discharging Solicitors, release of documents and lien over documents.

(a) *A Solicitor is entitled to be paid the scale or appropriate fees before he/she is discharged in a conveyancing matter.*

(b) *Solicitors are entitled to exercise their lien over documents:*

(i) *until their scale or appropriate fees are paid; or*

(ii) *until the appropriate undertaking to pay the scale or appropriate fees is received from the new Solicitor.*

According to the Rules & Rulings of the Bar Council Malaysia, so long as fees have not been paid the defendant is still not been discharged as solicitors.

The irony is that, in an email dated 15 December 2015 @ 3.28 p.m. (see *ANNEXURE E* attached) [marked as Exhibit ...] Ellen Huang threatened '*acceptance on No Outstanding fees owing*' to CTY & Co, which was matters in the transaction matters in respect of Beyond Hallmark Sdn Bhd, not the plaintiff's.

For all the precious time we had spent and hard works and services rendered to the plaintiff in respect of the transaction, the plaintiff did not pay us a single cent towards the Full Scale Fee and appeared not intending to pay us any money, not even reimburse us the out of pocket disbursements; but the plaintiff had suddenly purportedly terminated our services when all professional works had been completed except the submission of the Memorandum of Transfer to the relevant land office to register the tile of the land in favour of the plaintiff upon the balance purchase price been paid; which a junior legal clerk, an office boy or even a runner could do; yet plaintiff had refused to pay us any money for our time and hard works rendered. Thus, under sub-rule 16.01 (4) of the Rules and Rulings of the Bar Council Malaysia we had to take all lawful actions to protect our lien.

Q19. *Did you inform the plaintiff of receipt of the refunded stamp duty from LHDN?*

A19. On 18 July 2016, CTY & Co received a cheque from LHDN of the refunded stamp duty of RM8,445,651/- and promptly deposited into its clients' account on the same day. On 21 July 2016, CTY & Co wrote and informed the plaintiff (*then Fantastic Megaway Sdn Bhd*) (see p 231-233 CBD-1)[marked as Exhibit ...] inter alia that the defendant had received the refunded stamp duty and would deduct our fees in accordance with the Full Scale Fee and release the balance to them; and asked for their instructions thereto.

Q20. After that, what happened?

Q20. The plaintiff did not response to our above letter. We exercised reasonableness after clearance of the LHDN cheque by only deducted the first prong of our fee from the Full Scale Fee but deposited the second prong of our fee (RM1,183,320.12 together with the balance thereof i.e. RM6,076,978.71 to our client's account Fixed Deposit, vide Fixed Deposit slip No. S/No 894339 dated 21 July 2016 and Fixed Deposit slip No. S/No 894340 dated 21 July 2016 at Public Bank Berhad (Bandar Sri Permaisuri branch) so as to protect the interest of the plaintiff. (see para 6 of Affidavit of disclosure D2 [3] affirmed by me in 23.3.2017 (encl. 38).

Q21. *Beside the letter dated 21 July 2016, did CTY & Co at anytime disclose to the plaintiff that CTY & Co had received the refunded stamp duty?*

A21. Yes. I had made disclosure to this court in my disclosure affidavit affirmed by me on 23.3.2017 (encl.38). Earlier, in para 11 of the Afidavit Balasan Defendan [4] (encl.13) affirmed by me on 28 July 2016 and filed in the taxation proceedings. I had indicated that CTY & Co would finally (sic) had lien and possession of the refunded stamp duty.

Q22. *Upon deduction of the Full Scale Fee, why CTY & Co still kept the balance of RM6,076,978.71 and did not refund it to the plaintiff?*

A22. It was because on 26 July 2016 and 28 October 2016 respectively, CTY & Co had received notices from Messrs Sunita Osaman & Partners (solicitors for TSOTK and Ong Shu Woei, who were at all material times the directors of the plaintiff) prohibiting CTY & Co from releasing any or balance of the refunded stamp duty and holding CTY & Co liable in the event that any or the balance sum from the refunded stamp duty after deducting our fee were released to the plaintiff. (see p 234-235 CBD-1) [marked as Exhibit ...]. The defendant feared to be held liable if the money were to be release to the plaintiff; but we had taken reasonable step by placing the refunded stamp duty (after deducting the first prong of our fee) into our clients' account fixed deposit (on 28 July 2017, the Court had directed the defendant to replace the first prong of our fee into our clients' account FD, which had been duly complied with).

[123] But during the trial, DW1 said that his office manager, May Siew had prepared encl 127 and that it did not really reflect the true narrative. And so, DW1 prepared DW1A. He said he had not checked encl 127 before it was filed. He blamed May Siew and his previous solicitors.

[124] I turn now to DW3's witness statement where he said:

Q9. *Do you know the issues in relation to the stamp duty*?

A9. Yes. It was after several reminders from CTY & Co only at almost the eleventh hour, i.e. on 3 November 2015 (as the dead line to pay the stamp duty was on or before 8 November 2015) Ong Shu Woie finally received the banker cheque for the sum of RM8,445,561/- and I immediately instructed Ong Shu Woei to hand it over to CTY & Co. The letter was drafted by me and was sent to Ong Shu Woei via social media for printing.

Q10. *Do you know the issues in relation to the refunded stamp duty?*

A10. At all material times, I was aware. In the first place on 2 occasions over lunch and dinner at *Restaurant Maju Palace* at Maju Junction Mall and *Shanghai Restaurant* at JW Marriott Hotel KL, CTY had explained to both Felix Wong and U that the stamp duty paid would be refunded if the SPA was aborted for whatsoever reasons. Hence, when I instructed *Ong Shu Woei* to hand over the banker cheque for the stamp duty, I told him to authorize CTY & Co to obtain the refund of the stamp duty in the event that transfer of the Ampang land could not be registered. (*see page 1 CBD (Part Court*)).

Q11. *Do you know the disputes about the defendant's legal fees*?

A11. After Ellen Huang on behalf of Felix Wong had 'terminated' the services of CTY & Co (*there was no resolution of the plaintiff in that aspect*); CTY out of courtesy informed me that they were entitled to issued a fresh Bill for full scale fee. I told him that he could do whatever deem fit under the law. After that, the plaintiff received the Bill from CTY & Co (see pp 231 to 233, CBD-1).

Q12. *Can you enlighten the Court pages 234 and 235 of the CBD-1*?

A12. These are the letters from our (Ong Shu Woei and I) lawyers, Sunita Osaman & Partners addressed to CTY & Co, and putting them on notice not to release any balance from the refunded stamp duty of RM8,445,651/- after deducting their fees and disbursements. *In this regard, I was aware and indeed had consented to CTY & Co to obtain the refunded stamp duty of sum of RM8,445,651/- from the LHDN as I had been informed that CTY & Co had a lien over the money and that there was a time frame under the relevant law to apply for refund of stamp duty after the SPA had been terminated; otherwise it will be forfeited. I had instructed my lawyers to allow CTY & Co to deduct fees or disbursements due to them because I firmly believe and subscribed to the principle that they were entitled to be paid for professional works rendered.* The reason Ong Shu Woei and I had officially put CTY & Co on notice to stop from releasing the balance sum from the refunded stamp duty was because we have claim against the plaintiff (and 5 other) for having unlawfully transferred our shares in the plaintiff with consideration of RM5,100,000/- without our knowledge or consent and did not pay us the proceeds of the unlawful 'sale and transfer'. Our suit is Kuala Lumpur High Court Guaman No. WA-22NCVC-42-02/2017.

[125] In my view, CTY and/or DW1 was/were clearly not transparent or honest with LHDN. It is significant that DW1 did not inform LHDN that CTY was no longer the plaintiff's solicitors. He misled LHDN. No doubt he did mention in the *surat akuan* and in his covering letter that there was a

A dispute with the plaintiff over fees, but that was too fine a point for LHDN to pick up. How was LHDN to know that CTY was terminated as the solicitors for the plaintiff vis a vis the SPA. In his letter to LHDN, DW1 gave them the impression that CTY were still solicitors for the plaintiff.

B **[126]** Clearly, that was an untruth, both in fact and in law. I do not think that it is too speculative to suggest that if LHDN were unequivocally and unambiguously informed that CTY were no longer the solicitors for the plaintiff, LHDN would have very likely (and prudently) insisted on confirmation or authorisation from the plaintiff that the refund of stamp duty C sum can be released to CTY. CTY clearly did not inform or alert the plaintiff that they had applied to LHDN for the refund of the stamp duty sum. The failure to copy to the plaintiff (in Hong Kong) CTY's letter dated 15 February 2016 to LHDN was deliberate and is a manifestation of conduct which is lacking in probity on CTY's part. It is obvious enough that CTY did not want D to alert the plaintiff that they were seeking to obtain a refund of the stamp duty sum as the plaintiff would have immediately taken appropriate steps to prevent the refund from being made by LHDN directly to CTY.

E **[127]** The CTY affidavit which was filed in the taxation OS is inherently cryptic. It is understood only by those who drafted the affidavit. Although CTY had all along taken the position that they had made proper disclosure to the court hearing the taxation OS that they had applied for and received the refund of the stamp duty sum, DW1 conceded during cross-examination that F the paragraph in the CTY affidavit does not in fact convey the true facts. And DW1 said (rather conveniently), that there was in fact a mistake in the drafting of the paragraph in Bahasa Malaysia. Again, he blamed the previous solicitors for the mistake.

G **[128]** But the issue of error in translation only came up during cross-examination. All along DW1's position was that anyone reading CTY's affidavit would have understood that CTY had applied for the refund and had received the refund into their account. Indeed, besides not making proper disclosure in the taxation OS, it is also relevant to ask, since the taxation OS was H on-going, why didn't CTY instruct their solicitors, Messrs Chew Biman to inform the plaintiff's solicitors, Messrs Wong and Partners that the application for refund had been made, that CTY made deductions and retained the balance in fixed deposit accounts. It may be recalled that the taxation OS was filed on 2 June 2016 and shortly thereafter it was served on CTY. And the refund of the I stamp duty sum was received by CTY and credited into their account on 19 July 2016.

[129] Hence, the question is why did CTY send a letter to the plaintiff at the Pandan Jaya address on 21 July 2016 when Messrs Wong and Partners were

already acting for the plaintiff in the taxation OS? DW1 said that the taxation OS and the stamp duty refund are two different matters. I don't see how they are different, when the plaintiff was seeking via the taxation OS for delivery of the relevant stamp duty documents so that the plaintiff could apply for refund of the stamp duty sum. The suggestion that the refund of stamp duty sum and the taxation OS are different is legally and factually untenable. The stance taken by CTY in this regard further fortifies the inference that CTY was being surreptitious and disingenuous.

[130] The question is: why was CTY's letter dated 21 July 2016 to the plaintiff sent by registered post to the Pandan Jaya address when CTY knew that all correspondence to the plaintiff was always via emails to PW1 and/or PW2. Also, the answer by DW3 that he saw no reason to send CTY's letter dated 21 July 2016 to Felix Wong (PW1) is in defiance of logic and reason. It is also disingenuous. In this regard, it is also relevant to note that in an email dated 4 January 2016 to the plaintiff's company secretary and copied to PW1, PW2 and Sapina Saad, OSW wrote:

> Dear Stephen
>
> Based on the letter that I pass to your company last week, please file the Form 49 for resignation of Director/Shareholder for
>
> - Tan Sri Dato' Sri Ong Tee Keat
>
> - Sapina bt Md. Saad
>
> - Ong Shu Woei
>
> immediately in the following Malaysia-Registered companies:-
>
> - M Wealth Property Development Sdn. Bhd.
>
> - M Wealth Corridor Sdn. Bhd.
>
> - M Wealth Capital Sdn. Bhd.
>
> - Pahlawan Ulung Sdn. Bhd.
>
> Please update me once file in the Form 49.
>
> In future, any matters pertaining to the above-mentioned companies involving the interest of Mr. Felix Wong Sin Hua, Please feel free to liaise with his personnel in Hong Kong. You may contact them via email directly.
>
> Ellen (ellenh@gheg.com.cn)
>
> Felix Wong (felixwong@gheg.com.cn)
>
> As for the matters pertaining to the replacement of director, please liaise with them directly.
>
> Look forward hearing from you soon.
>
> Thanks.

Regards;

Frankie

(p 109, B1)

[131] Thus, it was clear that all communication pertaining to the plaintiff should have been made to PW1 or PW2 and not sent via letter to the Pandan Jaya address. It is rather puzzling that DW3 or his officer Sapina Saad did not see it fit to send CTY's letter dated 21 July 2016 to PW1 or PW2 in Hong Kong. In my view, this was not an oversight or mistake on anybody's part but rather it was part of the sinister plan by DW1 and DW3 not to keep PW1 and PW2 in the loop of what was taking place in Malaysia particularly, with regard to the refund of the stamp duty sum.

[132] Such conduct on DW3's part which was clearly designed to accommodate his own interest and that of his nephew (OSW) and which fitted nicely with DW1's 'self-help' approach, impels me to the conclusion that DW3 was only concerned about DW1 getting paid his fees (which comes quite clearly in his witness statement) and that any balance from the stamp duty sum should be frozen as he and his nephew had disputes over their shareholding and directorship in the plaintiff. DW3 was in my view blinded by his friendship with DW1 and became a willing accomplice in DW1's nefarious and sinister plan to collect the stamp duty sum from LHDN and deduct a part of it as CTY's fees/disbursements and keep the rest in fixed deposit accounts pending the outcome of DW3's dispute over directorship/shareholding in the plaintiff.

TERMINATION (DISCHARGE) OF A CONVEYANCING SOLICITOR

[133] I turn next to CTY's argument that although they may have been terminated, they are still undischarged as the plaintiff's solicitors vis a vis the SPA transaction. CTY relied on ruling 16.01(4) of the Bar Council Rules and Rulings. During the trial, I asked DW1 what is the position when a conveyancing solicitor's services are terminated, and the solicitor has issued a bill which is disputed and is being taxed by the former client. DW1 said that such a situation would be 'tricky'. For the plaintiff, it was argued that so long as there is a termination of the solicitor's services by the client, the solicitor is no longer on record and he is treated as having ceased as the solicitor for the client.

[134] In support of this proposition, counsel referred to the following passage in *In Re Galland* (1885) 31 Ch D 296 (at p 300):

> Mr Galland certainly was employed as the solicitor for the railway company, and has done their business up to within a recent time. His case upon his affidavits is that he was employed under the terms of a contract, the effect of which was that he, once solicitor, was entitled to remain solicitor, notwithstanding that the company sought

to discharge him. That point was put before me in Chambers, but, I think with great prudence, it has not been attempted to repeat the argument in Court. A solicitor is not an officer in the sense of holding a freehold office, and *a client can discharge him at any moment that he may think fit. If there is a contract between the solicitor and the client for the employment of the solicitor for a particular business or a particular period, and then there is a breach of that contract, the solicitor will have his remedy in the ordinary way, but he cannot insist on acting for the client against the client's will.* (Emphasis added.)

[135] DW1 said that CTY had been terminated but not discharged. He cited the case of *Lady De La Pole v Dick* (1885) 29 Ch D 351 which concerned the factual situation as to service of the notice of appeal on the defendant's solicitor who, when served, stated that they had ceased to act for the defendant, but they were still his solicitors on record. There was no notice of change of solicitors. The Court of Appeal had to grapple with the issue as to whether the authority of a solicitor on record continues, as between him and the other side, during the period through which the right of appeal exists. At pp 356–357 the English Court of Appeal held:

... there still was a duty imposed on the Defendant's solicitor on the record as between himself and his client, so far as the client had not discharged him, ...

...

...

According to that principle, until the judgment has been worked out, there is a duty imposed on the solicitor on the record to defend his client against any improper steps taken for the purpose of enforcing the judgment. Until that time, therefore, the solicitor on the record must be taken, as between him and the opposite party, to represent the client, unless the client not only discharges him but substitutes another solicitor on the record ...

[136] In so far DW1's reliance on ruling 16.01(4) of the Bar Council Rules and Rulings is concerned, my view is that it is of no assistance to CTY as that is a ruling of the Bar Council which recognises that there is a lien which exists in respect of documents in the possession of the solicitor who is discharged.

[137] It does not state that the conveyancing solicitor is not discharged until his fees and disbursements are paid. Rather it states quite unambiguously that until the solicitor's fees and disbursements are paid, the solicitor retains a lien over whatever documents that are in the solicitor's possession. Ruling 16.01(4) of the Bar Council Rules and Rulings is a mere non-statutory codification of the common law position vis a vis a solicitor's lien. The Bar Council Ruling in this regard does not in any way detract from the common law position of solicitor whose services had been terminated by the client. In a conveyancing transaction, once the solicitor's services are terminated, then the solicitor is

A discharged from the transaction. In the meanwhile, the solicitor has a lien over the documents in his possession. I will deal with the nature and scope of a solicitor's lien in the next paragraph.

B **[138]** The case of *Lady De La Pole v Dick* (1885) 29 Ch D 351 is not applicable in the present situation as this a non-contentious (conveyancing) matter whereas in that case the issue was whether service of the notice of appeal on the defendant's solicitor, who was still on record, was good service. The position of a solicitor in a litigation matter in Malaysia is governed by O 64 of the Rules of Court 2012. Hence, under the Rules of Court 2012, until a C solicitor is discharged or until there is a notice of change of solicitor, the solicitor on record is deemed to act for the client in the legal proceedings, regardless of any internal squabble or dispute between solicitor and client.

D **[139]** But here we are dealing with the termination and discharge of a conveyancing solicitor. I am not sure that there is even a difference between termination and discharge of a conveyancing solicitor. The position in law is as stated in *Re Galland*, ie upon termination, the solicitor ceases to represent the client and cannot insist on acting for the client against the client's will. Thus, E with effect from 14 December 2015, CTY had ceased to be the conveyancing solicitor for the plaintiff vis a vis the SPA transaction. And the implicit representation by CTY to LHDN to the opposite effect ie that they are the solicitors for the plaintiff, was legally wrong besides being factually and situationally dishonest.

F **[140]** DW1 said that he was not dishonest because if he was dishonest he would not have asked LHDN to pay into CTY's client account. But the truth is that although the stamp duty sum was paid into CTY's client account, CTY nevertheless immediately helped themselves to a sum of RM1,185,262.17 G (although they were already aware of the taxation OS) and kept the balance in fixed deposit accounts (on DW3' instructions). It is important to remind ourselves that to-date, the plaintiff has not enjoyed the benefit of any part of the stamp duty sum which was refunded by LHDN to CTY on 19 July 2016. I do not for a moment think that the mere fact of LHDN paying the stamp duty H sum into CTY's client account can be equated with DW1's honesty. DW1's honesty and by parity, CTY's honesty (or the lack of it) must be judged by reference to the entire matrix of fact, the motives and the probabilities which are attendant upon the case.

I **[141]** Looking at all the events in the round, I am satisfied that the plaintiff has proven that throughout this episode and culminating in the filing of the present suit, DW1 and CTY were not honest in their dealings with the plaintiff and with the Court hearing the taxation OS. CTY also misled LHDN by describing themselves as solicitors for the plaintiff. CTY acted dishonestly in

taking a sum of RM1,185,262.17 (although they were already aware that CTY's legal bill was being challenged in the taxation OS) and in keeping the balance in fixed deposit accounts (on DW3's instructions).

[142] In the process, it is also unfortunate that DW3's conduct has also been impugned in these proceedings. So much for the lack of honesty of the main actors in this unhappy episode.

[143] I turn now to the definition and scope of a solicitor's lien.

SOLICITOR'S LIEN

[144] In *Re Long* [1885] 31 Ch D 296 Bacon CJ said that solicitor's lien exists over the 'thing' which is held by the solicitor. He said (p 300):

> I cannot think that any lien exists in this case; the cases which have been cited to me are no authority for it. The plain law is this, that *a lien can only exist where there is a lawful possession of the thing upon which it is claimed by the person who claims it.* What rightful possession of the deeds had the solicitors in the present case? The deeds were the deeds of the mortgagees, and they were placed in the solicitors' hands only for safe custody. The solicitors had the deeds in their possession, not in any right of their own; their possession was that of the mortgagees, and nothing more. They trusted the mortgagor like any ordinary creditor, and bad no right to change their position into that of secured creditors because they happened to have the deeds of some other client in their possession.
>
> *No lien can attach on that which never was held by the solicitors by contract or in any other way as solicitors of the persons against whom the lien is claimed. I am of opinion that the appellants had no lien as against the mortgagor by virtue of their accidental possession of the deeds.* I dismiss the appeal, but I give no costs.

[145] In *Withers LLP v Langbar International Ltd* [2012] 2 All ER 616, the court referred to the following commentary in the *Halsbury's Laws* on the exact nature and scope of a solicitor's lien. It underscores (p 621) the principle that the lien extends to the 'thing' which is in the solicitor's possession and 'not over the thing which is not in one solicitor's hands'. It reads as follows:

> [19] 66 *Halsbury's Laws* (2009) (5th Ed) para 997 says (omitting footnotes):
>
> 'The general rule is that the *retaining lien extends to any deed, paper or personal chattel which has come into the solicitor's possession in the course of his employment and in his capacity as solicitor with the client's sanction and which is the client's property* ...
>
> *The lien does not extend to* ... (d) *documents which did not come into the solicitor's hands in his capacity as solicitor for the person against whom the lien is claimed* ... but as ... trustee'.

[146] In *Messrs Roland Cheng & Co v Konkamaju Sdn Bhd* [2014] 1 MLJ

894 (CA), the Court of Appeal explained:

> [25] At common law a solicitor has a right or lien to retain property in his possession until he is paid costs due to him in his professional capacity — see para 226 *Halsbury's Laws of England* Vol 44 (4th Ed). In the same volume of *Halsbury's Laws of England*, at para 229 the following passage is found:
>
> > A solicitor having a retaining lien over property in his possession is *entitled to retain the property as against the client,* and all persons claiming through him and having no better right than the client, *until the full amount of the solicitors taxed costs payable by the client is paid*.

[147] In *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)* [2011] 4 MLJ 161 (CA), the Court of Appeal recognised the right arising under a solicitor lien as a 'mere passive and possessory right', which gives no right of enforcement whatsoever in the hands of the solicitor:

> [11] Certainly, at common law a solicitor has a right to retain a client's document and property pending payment of the solicitor's Bill. A 1950 English case, *Barratt v Gough-Thomas, cited at* [1950] 2 All ER 1048, and followed in Canada (in *White Resource Management Limited v Durish* (1997) 154 DLR (4th) 158, used these words: 'The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an encumbrance or equitable charge. It is *merely passive and possessory*, that is to say, *the solicitor has no right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents or other personal property of his client or former client*'. From *Re Motherwell* (1927) 62 DLR 130 (Ontario Supreme Court): 'The right of a solicitor to a lien on the documents of his client which come to his hands in the course of his employment is a well recognised right, and one which ... is for the benefit of clients as it often enables or induces solicitors to carry on proceedings for the client which they might otherwise be unwilling to do; but it is a right which is subject to certain qualifications'. 'The right of a solicitor in documents in his possession cannot exceed that of his client, and if third persons have a joint interest in them, or for any other cause have a right to call on the client to produce them, the lien of the solicitor cannot debar them of that right. 'The solicitor's lien creates no charge upon the property, if any, to which the documents relate, it is not like an equitable mortgage by deposit; the *lien is merely a passive right of retainer, and cannot be actively enforced as in the case of other liens. So long as it exists it has been held that the solicitor can withhold the documents from inspection by his client, or anyone claiming under him;* although it has been held that the client can by subpoena duces tecum served on the solicitor compel him as a witness to produce them in evidence in support of the client's case' (www.duhaime.org/LegalDictionary).

[148] Thus, the principle that may be culled from the abovementioned cases is that the lien exists over what the solicitor has in his possession and not over what he did not have. The next important principle is that the lien is a passive and possessory right. It is not an active and enforceable right. What this means

is that the solicitor is entitled to lawfully hold on to whatever documents belonging to the client until the solicitor's fees and disbursements are paid or until the taxed fees and disbursements are paid. Most certainly the lien does not extend to allowing the solicitor to use the documents which are being held under the lien and to make an application to LHDN for refund of the stamp duty sum. It is important to recall that the lien is passive and possessory. It is not enforceable in the sense of being used in such a way that the 'thing' which is the subject of the lien may be converted from documents into cash, which is what happened in this case. Of course, on the facts here, a prolonged delay (ie beyond 21 September 2016) in applying for refund of the stamp duty sum may have resulted in the stamp duty sum being forfeited by LHDN but that does not mean that CTY can unilaterally convert the stamp duty sum documents into cash by applying for the refund, crediting the entire sum into their client account and later taking a portion of the sum as part payment of their fees, before keeping the rest in fixed deposit accounts (on DW3's instructions).

[149] This was a blatant misuse or abuse of the lien on CTY's part. There were other ways of resolving CTY's concerns in relation to the possible forfeiture of the stamp duty sum by LHDN but the reality here was that it was still early days when CTY applied to LHDN for the refund (15 February 2016) and there was no risk of any forfeiture LHDN. CTY should have transparently and honestly forced the issue by putting the plaintiff on notice and procuring an undertaking by the plaintiff's new solicitors, for their fees and disbursements. DW1's theory of wanting to 'protect' the lien is patently untrue. DW1 wanted quick payment of his fees. From the evidence, it is clear as night follows day, that CTY wanted to lay their hands on the stamp duty sum as quickly as possible and to help themselves to a portion of the fees and to keep the balance in fixed deposit accounts, well out of reach of the plaintiff. And all of this was done without the plaintiff's knowledge or approval. This was not even mentioned or articulated or alluded to in CTY's affidavit(s) in the taxation OS. CTY did not instruct their solicitors in the taxation OS to inform the other side of all of these important and crucial developments. CTY's modus operandi and motive is quite clear. They decided to go behind the plaintiff's back and made the application to LHDN for refund of the stamp duty sum, without informing the plaintiff so that this would be a *fait accompli* and the plaintiff would have no choice but be forced to negotiate with CTY on their fees.

[150] At another level, CTY's act of acceding to DW3's instructions to retain the balance until his dispute over directorship and shareholding in the plaintiff is disposed off, is yet another manifestation of utmost bad faith and CTY had absolutely no business taking any instructions from DW3 on the balance of the stamp duty sum. It is entirely possible that the retention of the balance of the stamp duty sum in fixed deposit accounts was to give DW3 leverage in any negotiation with PW1. At the risk of repetition, it is important

for me to state in no uncertain terms that as a matter of law, CTY were not entitled to convert the documents covered by the lien into cash. As a matter of fact, CTY did not have the plaintiff's consent to apply for the refund or to receive the refund from LHDN or to deduct any part of the stamp duty sum as part payment of fees and disbursements. CTY had no business taking instructions from DW3 and in keeping the balance of the stamp duty sum in fixed deposit accounts. CTY misled LHDN into thinking that CTY were still acting for the plaintiff when they made the application for refund of the stamp duty sum. CTY did not make disclosure to the Court hearing the taxation OS about the fact that they had in February 2016, made the application for refund of the stamp duty sum, that on 19 July 2016, the stamp duty sum had been credited in their client account and that they had unilaterally deducted a sum RM1,185,262.17 in untaxed fees for the aborted SPA transaction, notwithstanding that CTY's legal bill is being disputed in the taxation OS and that they kept the balance in fixed deposit accounts.

EXEMPLARY DAMAGES

[151] I turn now to the claim for exemplary damages. In this regard, counsel for the plaintiff referred to the Court of Appeal's decision in *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626; [2009] 1 LNS 866 (CA) which reads as follows:

> [80] The purpose of exemplary damages is to punish. And the quantum of the exemplary damages may be influenced by the size of the compensation sought even to the extent of exceeding the size of the compensation itself. In *Rookes v Barnard And Others* [1964] AC 1129, at p 1228, Lord Devlin observed that:
>
> > ... a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their dissapproval of such conduct and to deter him from repeating it, then it can award some larger sum.
>
> [81] In *Bradford City Metropolitan Council v Arora* [1991] 2 QB 507 (CA), the Court of Appeal while acknowledging that exemplary damages should be awarded only where compensatory damages are inadequate to punish the defendant, upheld an exemplary award of the industrial tribunal.
>
> [82] In *Sallows v Griffiths* [2001] FSR 15 (CA), the court refused to order exemplary damages because it considered that the compensatory award was adequate. In *Drane v Evangelou And Others* [1978] 1 WLR 455 (CA), both Lawton and Goff LJJ thought it was justifiable to amalgamate aggravated damages with exemplary damages.

[152] In this case, the plaintiff has asked for exemplary damages, and this is premised on the conduct of CTY as elucidated above.

[153] In this context, it was submitted for the plaintiff (and I have so found) that CTY's letter dated 15 February 2016 to LHDN and *surat akuan* is false and misleading, it was utterly dishonest. Hence, counsel said:

> If one draws all these threads together it can lead to only one conclusion as to CTY's conduct — that they were plainly dishonest and constructed a shabby deception in order to take for themselves the plaintiff's

[154] The issues raised in this case and the several complaints levelled against CTY are of paramount importance to the legal profession in Malaysia. In view of the gravity of the several allegations that were made against CTY, counsel for the plaintiff made an impassioned plea to this court to find liability against CTY and order restitution of monies which were wrongfully procured and placed in their custody, and to also order exemplary damages by reason of their conduct which were described as, inter alia, lacking in transparency, dishonest, deceitful, outrageous and appalling. According to counsel for the plaintiff, an award of exemplary is necessary in this case so as to punish CTY for their nefarious conduct. Counsel for the plaintiff said that the implications and ramifications arising out of the solicitor's conduct extends beyond the boundaries of the case itself and has a negative impact on the legal profession as a whole in that if an award of exemplary damages is not made, then that would be akin to allowing CTY to get away scot-free with their misconduct.

[155] It was said during closing submissions by counsel for the plaintiff, that lawyers have a special and unique position in society and are in positions of trust, particularly with regard to monies belonging to their clients. As such, it was contended for the plaintiff that, 'lawyers like Ceaser's wife, must be above suspicion'. It is said that the property investment here involved foreign investors and the deal had been terminated and the client's monies were misappropriated by CTY. And as such, the conduct of CTY has tarnished the image of Malaysia as a favourable investment hub. At the same time, the Malaysian legal profession has also been brought into disrepute by reason of the alleged misdeeds of CTY, whose conduct has come under intense curial scrutiny in these proceedings. In this regard, counsel also referred to the High Court case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, where Edgar Joseph Jr J (as he then was) referred to the leading House of Lords decision in *Rookes v Barnard* [1964] AC 1129 on the point of exemplary damages and explained (p 229) as follows:

> *Rookes v Barnard* was a case concerning intimidation in industrial relations, in the course of which a question arose whether 'exemplary' damages could be awarded in respect of a flagrant breach of contract. In that case Lord Devlin, with the unanimous approval of all his brethren, reviewed the law and laid down that exemplary damages could only be awarded in three categories of cases. These concerned, first, oppressive action by officers of the Crown; *secondly, cases where the defendant 'with a cynical disregard for a plaintiff's rights has calculated that the money*

to be made out of his wrongdoing will probably exceed the damages at risk', and thirdly, where statute expressly authorised exemplary damages.

Lord Devlin also expressed three 'considerations' applicable to all cases of exemplary damages: first, that the plaintiff cannot recover such damages unless he is himself the victim of such 'punishable behaviour'.

Secondly, 'exemplary' damages can be used both for and against liberty, and are a punishment without the safeguard of the criminal law, so that the weapon must be used with restraint, and the House might have 'to place some arbitrary limit on such awards' despite the respect due to assessment of damages by juries. Thirdly, the financial means of the parties, though irrelevant to compensatory damages are relevant to exemplary damages. (Emphasis added.)

[156] The other case that was referred to was the High Court's decision in *Agrokor Sdn Bhd v Perkayuan TM (Malaysia) Sdn Bhd* [2015] MLJU 961; [2015] 6 CLJ 594 (HC) where the High Court roundly condemned the conduct of the vendor in that case who had unjustly enriched themselves. The court ordered exemplary damages. Thus, it is clear from the principles derived from the cases mentioned above that exemplary damages are not compensatory, but rather they are punitive in nature and the purpose of such an award is to punish the wrong-doer for the conduct which has been variously described, inter alia, as outrageous, oppressive, appalling, high handed or in cynical disregard for the rights of the plaintiff. The award is to mark the court's disapproval of the defendant's conduct. It is to deter the defendant from repeating it. Indeed, exemplary damages should be awarded only where compensatory damages are inadequate. In such a situation the court may award a sum which is larger than compensatory damages. But the court must exercise some restraint on the award of exemplary damages and all circumstances must be taken into account, including the financial means of the parties and the conduct of the wrong-doer right up the time of judgment.

[157] Here, I cannot fathom CTY's financial means as there is nothing to indicate what exactly is the financial status of the firm. The fact that some pages of CTY's client's account is before the court is not indicative of anything, as monies in the client's account are not necessarily funds that are to be paid to the firm's office account. I turn now to CTY's conduct which, I have already dealt with somewhat in detail and given my conclusions at almost each intersection of the events and narrative of this rather regrettable episode. But since I am on the topic of exemplary damages, I will mention in brief the main points which justify an award of exemplary damages. The positions taken here are diametrically opposite. The plaintiff has painted CTY's conduct as sinister in the extreme whereas CTY maintain that they did no wrong, acted honestly and transparently at all times and did what they did in order to protect their solicitor's lien and to protect and preserve the plaintiff's interest. As I have already mentioned earlier, CTY were not entitled to apply to LHDN for a

refund of the stamp duty sum as they had already been terminated as the plaintiff's solicitors. CTY did not inform the plaintiff of the fact that they would be or had applied to LHDN for refund of the stamp duty sum. Further, CTY did not inform the plaintiff or their new solicitors who were handling the taxation OS of the fact that CTY had applied for the refund of the stamp duty sum, had received the sum, made a deduction and kept the balance in fixed deposit accounts. These matters were also not brought to the attention of the court hearing the taxation OS.

[158] CTY misled LHDN by giving them the impression that they were the solicitors for the plaintiff at that point in time when they made the application for refund of the stamp duty sum. Despite all of these, CTY maintain that they should not be punished for their actions. I accept that if there is delay in applying to LHDN for the refund of the stamp duty sum, eventually the monies may be forfeited by LHDN. But that of itself cannot justify CTY's actions in doing what they did. CTY's conduct in applying for the refund cannot be viewed in isolation. It has to be viewed in totality. The totality of CTY's conduct as described above, is nothing more than a blatant and deliberate act on their part (coupled with active or tacit encouragement from DW3) in surreptitiously applying to LHDN and receiving the refund of the stamp duty sum and thereafter helping themselves to a portion of the monies and keeping the balance in fixed deposit accounts as per DW3's instructions. The sending of CTY's letter dated 21 July 2016 to the plaintiff's Pandan Jaya address by registered post (instead of by email as per the usual practice), which was duly received by DW3's staff, Sapina Saad and the failure of DW3 thereafter, to forward the letter to PW1 or PW2 demonstrates or reveals quite convincingly, the sinister plot between CTY (DW1) and DW3 to ensure that CTY is paid part of their of their fees and that the plaintiff is deprived from the benefit of having their monies returned to them. It is not out of place to mention that the plaintiff had already lost out on the SPA transaction in that a sum of RM28,171,870 had been forfeited by the vendor in January 2016.

[159] Thus, the actions of CTY in applying for, receiving into their account, keeping part of the monies for themselves and keeping the balance in fixed deposit accounts added further 'salt to the wound' and is a breach of CTY's fiduciary duties (as solicitors) towards the plaintiff (their former client). There was hardly any transparency or honesty that was displayed by CTY. Right until the time of delivery of this judgment there was no acknowledgement by CTY that their actions were wrongful. The taking of a sum of RM1,185,262.17 in untaxed fees on 19 July 2016, despite the fact that the taxation OS was ongoing, apart from being dishonest and deceitful, was a misappropriation of client's monies which were deemed to be held on trust by CTY for their former client. As rightly submitted by counsel for the plaintiff, the conduct of CTY and that of DW1 in particular, has done serious damage to the image and

reputation of the legal profession in Malaysia. Indeed, if this is the way conveyancing solicitors behave and conduct themselves, then there is no doubt at all that potential foreign investors will stay away from Malaysia. In my view, there is nothing in the evidence before me, which mitigates CTY's entire and overall (mis)conduct, which is egregious, appalling and outrageous. I am compelled to the conclusion that such conduct necessarily and inherently invites punitive damages. As such, an award of exemplary damages is more than warranted and justified in the present circumstances.

[160] The factors that I have taken into account in arriving at the appropriate quantum of exemplary damages are the blatant and brazen manner in which CTY went about in making the application to LHDN, including making use of a purported letter of instruction dated 3 November 2015 (ID-D1) (the authenticity of which is very much in doubt), the failure to send a copy of CTY's letter dated 15 February 2016 to LHDN to the plaintiff, the misrepresentation to LHDN that CTY were still acting for the plaintiff in the SPA transaction, the failure to disclose to the Court hearing the taxation OS that they had applied for and received the stamp duty sum and taken part of the monies towards their fees and retained the balance in fixed deposit accounts, the failure to send the letter dated 21 July 2016 by email to PW1 or PW2, which is the usual and established practice and instead sending it to the Pandan Jaya address, knowing fully well that PW1 or PW1 have no physical connection with that address, deducting a sum of RM1,185,262.17 from the refunded sum of RM8,445,561 and in taking instructions from DW3 or his solicitors and retaining the balance in fixed deposit accounts. I have also taken into account that CTY has had the benefit of the sum of RM1,185,262.17 since 19 July 2016 until 28 July 2017 and that the entire sum of RM8,445.561 which is to be returned to the plaintiff is the plaintiff's monies. And so in returning the sum of RM8,445,561 nothing comes out of CTY's own pocket. In that sense, it would be a grave wrong if CTY gets off scot-free and does not pay any exemplary damages for what they had done.

[161] In this regard, I have drawn guidance from the recent Court of Appeal's decision in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 where it was said:

> [43] ... exemplary damages are not intended to compensate the plaintiff and are not recoverable as a matter of right. The amount of the exemplary damages award is left to the judge's discretion and is determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant. The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted to the parties involved. Exemplary damages must not be uncontrolled or arbitrary; they must be of an amount that is the minimum necessary to achieve their purpose in the context of the particular.

[162] Thus, taking all of the facts, factors and circumstances into consideration and also having due regard to the fact that this court's condemnation of CTY's conduct is of itself somewhat of a punishment, a sum of *RM250,000 as exemplary damages* would be fair, reasonable, equitable and proportionate to CTY's conduct and sufficient to achieve the purpose of deterring CTY or any other likeminded solicitor from embarking on such a treacherous and perilous course of conduct.

RECAPITULATION OF FINDINGS

[163] I come now to the end of my judgment and it would be helpful to set out the court's findings and the answers to the several issues raised during the course of the trial. The answers herein will also impliedly address the issues mentioned in para 1(a)–(i) of the grounds of judgment. The court's conclusions are given below in **bold print**:

(a) whether the letter dated 3 November 2015 by the plaintiff, when it was known as Fantastic Megaway Sdn Bhd ('ID-D1') is a genuine letter issued contemporaneously with the handing over of the Malayan Banking Berhad Banker's Cheque for RM8,445,561? **The letter was marked as ID-D1 and a ruling was made not to admit it as an exhibit as OSW and/or CTY's staff, Siew May was/were not called by CTY to testify as to the authenticity of the letter. As such there is no basis to conclude that it is a genuine document which was issued contemporaneously with the handing over of the Banker's Cheque on 3 November 2015. In all probability it was created after that date and closer in time to CTY's letter dated 15 February 2016 to LHDN;**

(b) if the said letter dated 3 November 2015 is genuine then whether CTY was entitled to apply to LHDN for refund of the stamp duty sum on 15 February 2016 albeit that CTY was no longer the solicitor for the plaintiff vis a vis the SPA transaction? **Even if the plaintiff's letter is genuine and was issued on 3 November 2015, it does not legitimise CTY's application to LHDN for a refund of the stamp duty sum as by then, CTY were no longer the plaintiff's solicitors vis a vis the SPA transaction;**

(c) assuming that CTY was entitled to make the application for the refund, then whether they could lawfully deduct a sum of RM1,183,549.21 and withhold the balance in fixed deposit accounts whilst CTY was aware that the plaintiff was challenging CTY's legal bill via the taxation OS? **The sum of RM8,445,561 was monies belonging to the plaintiff. They were client's monies and being in a solicitor/ex-client relationship, the fiduciary relationship between CTY and the plaintiff still existed. Hence, the unilateral and unauthorised deduction of RM1,183,549.21 constituted a breach of CTY's**

fiduciary duty towards the plaintiff and was a misappropriation of client's monies;

(d) did the plaintiff validly terminate CTY's services as the solicitors for the SPA transaction with effect from 14 December 2015? **The termination of CTY's services pursuant to PW2's email to CTY validly terminated and discharged CTY and with effect from 14 December 2015, CTY ceased to be the plaintiff's conveyancing solicitor vis a vis the SPA transaction;**

(e) in view of PW2's email dated 14 December 2015 terminating CTY's services, can CTY take the position that since their fees have not been settled by the plaintiff, they have not been 'discharged' as solicitors for the SPA transaction and/or that they have a lien over the stamp duty monies? **With effect from 14 December 2015 CTY ceased to be and were discharged as the plaintiff's conveyancing solicitor vis a vis the SPA transaction. And since CTY's legal bill dated 15 December 2015 was not settled, at common law and/or under rule 16.01(4) Rules and Rulings of the Bar Council Malaysia, CTY had a 'solicitor's lien' but this lien was specifically over the 'stamp duty documents' and 'not over the stamp duty monies' which had been refunded by LHDN;**

(f) in this regard, can CTY question the plaintiff's locus standi to terminate CTY's services when CTY had responded by issuing a legal bill for services rendered (up to date of termination)? **CTY cannot question the plaintiff's act of terminating their services and are estopped from questioning the plaintiff's locus standi as CTY has expressly and/or impliedly accepted that they were terminated as the plaintiff's conveyancing solicitors;**

(g) by issuing the letter dated 15 December 2015 and the legal bill No 03774 dated 15 December 2015 for RM2,411,870, did CTY expressly or implicitly condone or accept that they were validly terminated as solicitors for the SPA transaction? **By their said conduct, CTY has expressly and/or impliedly accepted that they were terminated as the plaintiff's conveyancing solicitors;**

(h) by issuing the letter dated 29 January 2016, did CTY further signify their implicit acceptance that they had been validly terminated as solicitors for the SPA transaction? **By their said conduct, CTY has expressly and/or impliedly accepted that they were terminated as the plaintiff's conveyancing solicitors;**

(i) did CTY contemporaneously challenge the termination of their services as solicitors for the SPA transaction? **There is absolutely no evidence that CTY contemporaneously challenged the termination of their services as solicitors for the SPA transaction;**

(j) did OSW issue the letter dated 3 November 2015? **As OSW did not testify, it would be speculative to conclude that OSW issued the letter dated 3 November 2015. In all probability the letter dated 3 November 2015 was an afterthought which was created in order to legitimise CTY's act of seeking a refund of the stamp duty sum from LHDN;**

(k) did OSW send the letter dated 3 November 2015 to PW2 as an attachment to his email to PW2 (p 75 B1) and if not, why not? **The evidence suggests that OSW did not send the letter dated 3 November 2015 to PW2 as an attachment to his email to PW2 (p 75 B1) and this is probably because the letter did not exist as at the date of OSW's email to PW2;**

(l) was OSW asked at any time by anyone to confirm that the signature on the letter dated 3 November 2015 is his and that the letter was used as the covering letter to hand over the banker's cheque for RM8,445,561 to CTY? **No one from the plaintiff asked OSW to confirm that the signature on the letter dated 3 November 2015 is his and that the letter was used as the covering letter to hand over the banker's cheque for RM8,445,561 to CTY;**

(m) did PW2 ask OSW about the letter dated 3 November 2015, after they became aware of its existence? **It is clear that PW2 did not ask OSW about the letter dated 3 November 2015, after they (PW1 and PW2) became aware of its existence;**

(n) if plaintiff had doubts about the genuineness of the letter dated 3 November 2015, why didn't they seek confirmation with OSW or lodge a police report? **There is no evidence from the plaintiff to explain why they did not seek confirmation from the OSW or to lodge a police report as to the genuineness of the letter dated 3 November 2015;**

(o) assuming the letter dated 3 November 2015 was in fact the covering letter to hand over the banker's cheque to CTY, is it a letter which is 'favourable' to CTY in the sense that it exonerates CTY for their conduct which is being impugned in this suit? **Even if the plaintiff's letter is genuine and was issued on 3 November 2015, it does not legitimise CTY's application to LHDN for a refund of the stamp duty sum as by then CTY were no longer the plaintiff's solicitors vis a vis the SPA transaction. Hence, CTY cannot rely on any earlier (purported) instructions from the client to justify their action in applying to LHDN on 15 February 2016 for the refund of the stamp duty sum;**

(p) why did CTY send the letter to the plaintiff on 21 July 2016 (pp 231–232 B1) to its address in Pandan Jaya when all along, letters were emailed as attachments to all the directors including PW1 and/or PW2

(based in Hong Kong)? **CTY sent the letter dated 21 July 2016 to the Pandan Jaya address, instead of sending it via email to PW1 or PW2 as per the usual and established practice, because DW1 (and DW3) knew that PW1 and PW2 had no physical presence at that address. Hence, even though the letter was received at that address, PW1 and PW2 did not know about the letter until they saw it as an exhibit in the interlocutory proceedings in this case and in the defamation suit. CTY's intention was to ensure that PW1 and PW2 were not made aware of the refund of the stamp duty sum, payment into CTY's account and the deduction of the monies. Further, the retention of the balance in the fixed deposit accounts (to keep the monies out of the reach of the plaintiff — as per DW3's instructions) will not be scuttled or frustrated or hindered by PW1 and PW2 being alerted to the contents of CTY's letter;**

(q) what is the legal position or status of a solicitor whose services in a conveyancing transaction have been terminated and can the said solicitor continue to perform any function or do any acts pertaining to the conveyancing transaction including, but not limited to applying for refund of the stamp duty sum? **The true legal position (per** *Re Galland***) is that the plaintiff as CTY's conveyancing client can discharge CTY as their solicitor at any moment that they may think fit and CTY cannot insist on acting for the plaintiff against their will. And so, with effect from 14 December 2015, CTY could not lawfully continue to perform any function or do any acts pertaining to the conveyancing transaction including, but not limited to applying for refund of the stamp duty sum;**

(r) can CTY rely on cl 4.3 of the SPA to justify their conduct in applying to LHDN for refund of the stamp duty sum? **This point was abandoned during submissions. And so, I will not comment on it;**

(s) what inference (if any), is to be made by the absence of any mention in CTY's letter dated 15 February 2016 (pp 114–115 B1) and CTY's *surat akuan* dated 15 February 2016 (pp 6–7 B2) to the LHDN of the fact that they had been terminated as solicitors for the SPA transaction? **The only inference is that CTY did not make any mention in the letter and surat akuan to LHDN that they had been terminated as the plaintiff's solicitors in the SPA transaction and instead gave the impression that they were the plaintiff's solicitors, as there was a risk that LHDN may not have entertained the application which came from a solicitor whose services had been terminated and LHDN may (or would) have insisted on authorisation from the plaintiff themselves that the stamp duty sum can be made to CTY. Obviously CTY knew that, if asked, the plaintiff would not have given such authorisation. Hence, CTY deceived LHDN into thinking that they**

were dealing with a solicitor who was still acting for the plaintiff;

(t) does the evidence show that CTY applied for the refund of stamp duty sum, deducted a sum of RM1,185,262.17 and placed the balance in fixed deposit, in order to protect their lien and to protect the plaintiff's interests? **The evidence shows that CTY was only interested in getting the stamp duty sum paid to themselves as quickly as possible so as to enable them to unilaterally make the deduction of a portion of the stamp duty sum and keep the balance in fixed deposit accounts, as instructed by DW3 (who had no authority to give such instruction). The question of protecting the client's interest does not even arise. Everything that was done by CTY were self-serving and/or to serve the interest of DW1's good friend, DW3. The plaintiff's interests did not feature in this equation. In law, CTY's lien over the stamp duty documents was passive and possessory and it did not give them the right to use the stamp duty documents covered by the lien to apply to LHDN and convert the stamp duty documents into cash in the form of the refund of the stamp duty sum; and**

(u) does the fact that under s 57 of the Stamp Act 1949, there is a time period within which a refund of stamp duty for an aborted transaction has to be applied for, justify CTY's conduct in applying for refund of the stamp duty sum after their services as solicitors for the SPA transaction had been terminated? **The risk of the stamp duty sum being forfeited by LHDN** as per **s 57 of the Stamp Act 1949 (as important as it was) was not immediate and/or immediately pressing. There was still time to resolve the issue in a way that preserves the plaintiff's position and protects CTY's lien. CTY just took it upon themselves and went about it in a brazenly disingenuous, dishonest and deceptive manner.**

THE ORDER

[164] For the reasons as stated in the preceding parts of the grounds of judgment above, I will now proceed to make the following orders:

(a) judgment is entered against the defendant for the sum of RM8,445,561 and it is further ordered consequentially that upon service of the sealed order herein on Public Bank Bhd (Bandar Permasiru Branch), the sum of RM8,445,561 (together with all interest accrued thereon) held by the defendant in fixed deposit accounts with Public Bank Bhd (Bandar Sri Permaisuri Branch) be uplifted and paid forthwith to the plaintiff's solicitors, Messrs Sreenevasan Young which shall be deemed as full payment to the plaintiff;

(b) the defendant is ordered to pay interest on the sum of RM8,445,561 at 5%pa from 19 July 2016 until the date the sum of RM8,445,561

(together with all interest thereon) is fully paid to the plaintiff's solicitors and credit shall be given for the interest which accrued on the fixed deposit accounts;

(c) the defendant is ordered to pay exemplary damages in the sum of RM 250,000 with interest thereon at the rate of 5%pa from the date of this judgment hereof until the date of full payment or realisation; and

(d) the defendant shall pay costs of RM70,000 (subject to 4% allocator) to the plaintiff.

Order accordingly.

Reported by Afiq Mohamad Noor